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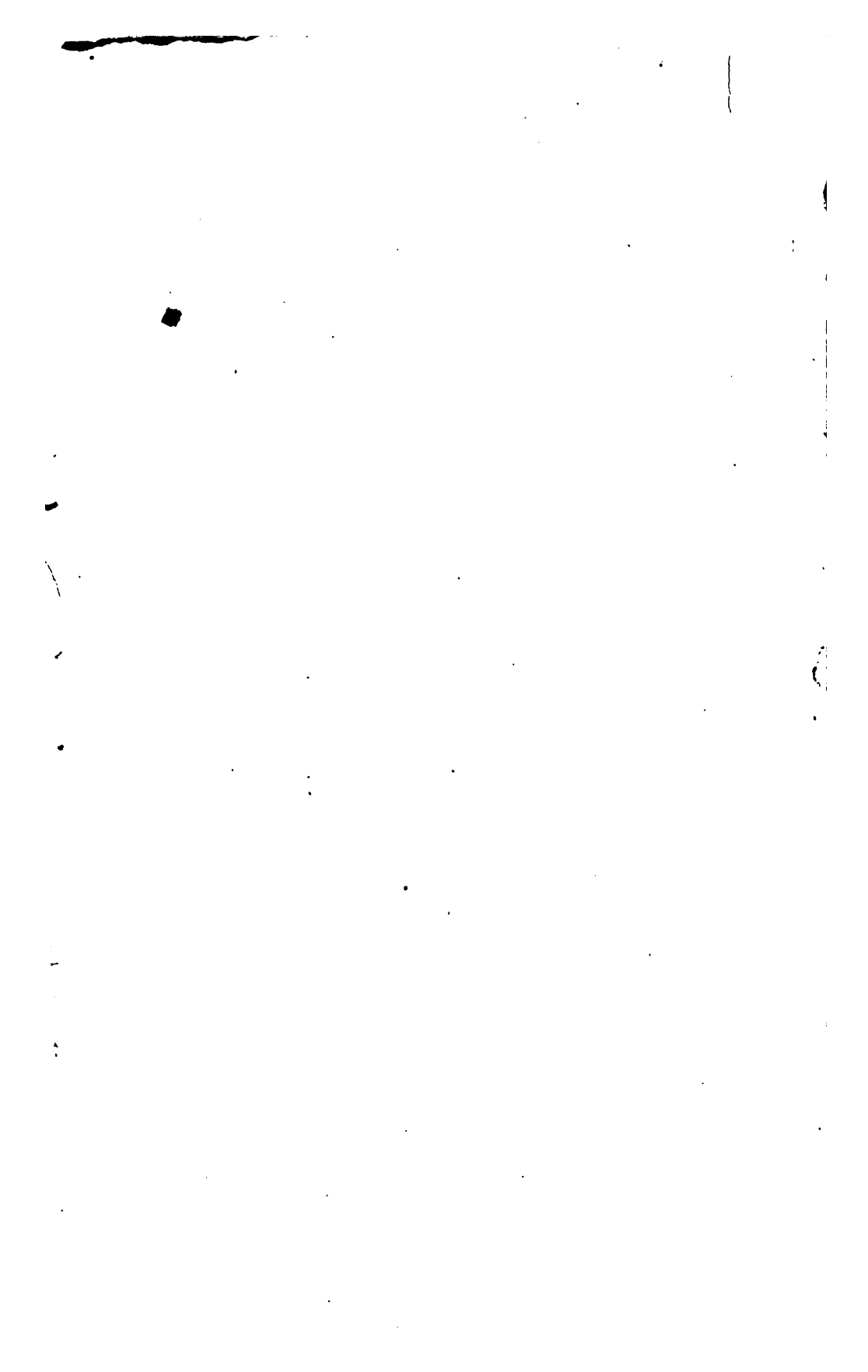
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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES  
CITED AND AN INDEX.

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By FRANCIS M. DICE,  
OFFICIAL REPORTER.

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VOL. 90,

CONTAINING CASES DECIDED AT THE MAY TERM, 1883,  
NOT REPORTED IN VOLS. 88 AND 89.

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JUDGES  
OF THE  
SUPREME COURT  
OF THE  
STATE OF INDIANA,  
DURING THE TIME OF THESE REPORTS.

---

HON. WILLIAM E. NIBLACK.\* †  
HON. GEORGE V. HOWK. †  
HON. BYRON K. ELLIOTT. †  
HON. ALLEN ZOLLARS. †  
HON. EDWIN P. HAMMOND. §

\*Chief Justice at the May Term, 1883.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 3d, 1881.

§Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

(xvi).

# SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

---

HON. GEORGE A. BICKNELL.\*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.†

Chief Commissioner.

Appointed April 27th, 1881.

Appointed May 29th, 1882.

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**OFFICERS**  
**OF THE**  
**SUPREME COURT.**

---

**CLERK,**  
**SIMON P. SHEERIN.**

**SHERIFF,**  
**JAMES ELDER.**

**LIBRARIAN,**  
**CHARLES E. COX.**

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1883, IN THE SIXTY-SEVENTH  
YEAR OF THE STATE.

11,012.

STOUT v. THE STATE.

**PRACTICE.**—*Filing Bill of Exceptions.*—*Certificate of Clerk.*—It sufficiently appears that a bill of exceptions was filed within the time limited, if the certificate of the clerk authenticating the transcript containing it bears date within the time.

**CRIMINAL LAW.**—*Poor Person.*—*Power of Supreme Court.*—The Supreme Court has no authority to appoint or pay an attorney to prosecute an appeal for a defendant in a criminal case, and an attorney so appointed by the court below has full authority to prosecute the appeal.

**SAME.**—*Cause for New Trial.*—That the court admitted "irrelevant, incompetent and immaterial evidence," or rejected "competent, material and relevant evidence," will not be sufficiently specific as causes for a new trial, to present any question; so, also, that the court refused to permit the defendant to prove by A., B., C., and other competent witnesses, "the diseased condition of his mind at the time of and before the homicide."

**SAME.**—*Competency of Juror.*—*Constitutional Law.*—Section 1793, R. S. 1881, is constitutional, and a juror having an opinion based only on rumor or newspaper statements, but who says upon oath that he can give an impartial verdict on the evidence, may, in the discretion of the trial court, be sworn as a juror, and in such case the Supreme Court will reverse only where it appears that this discretion has been abused.

**SAME.**—*Practice.*—The jury may properly have the indictment when retired to consider of their verdict.

90	1
126	49
90	1
230	268
90	1
144	246
145	40
147	385
90	1
148	700
149	407
149	410
90	1
153	565
90	1
171	50

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Stout v. The State.

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**SAME.—Instructions.**—A statement by the court to the jury, that the venue of the cause has been changed from another county, is harmless to the defendant, as well as unobjectionable.

**SAME.—Evidence.**—On a trial for murder, a general instruction concerning the law of homicide, some parts of which have no application to the evidence, will not be available error, unless in the particular case it seems probable that it might have confused or misled the jury, and this can not be supposed where the verdict is clearly right upon the evidence.

**SAME.—Manslaughter.**—An instruction, that "Voluntary manslaughter is the unlawful killing of a human being, without malice, express or implied—voluntary, upon a sudden heat, *as upon adequate provocation the passion has been aroused*, and the fatal act is unlawfully and voluntarily committed before sufficient time has elapsed to allow the passion to cool and for reason to resume its sway," is not erroneous.

**SAME.—Reasonable Doubt.**—*Jarrell v. State*, 58 Ind. 293, followed as to what is a reasonable doubt.

**SAME.**—A careful and impartial admonition to the jury of the importance of the cause, in a trial for murder, as well to the rights of the defendant as to the interests of society, is not error.

**SAME.—Verbal Inaccuracies.**—An instruction containing, by evident inadvertence or clerical error, a word which is merely inaccurate, as the use of "description" instead of "discretion," but which could not possibly mislead, is not available error.

From the Parke Circuit Court.

*J. R. Courtney*, for appellant.

*F. T. Hord*, Attorney General, *F. M. Howard*, Prosecuting Attorney, *J. H. Burford*, *G. W. Paul*, *M. D. White* and *J. E. Humphries*, for the State.

**NIBLACK, C. J.**—This was a prosecution for murder in the first degree, originating in the Montgomery Circuit Court, from which a change of venue was taken to the Parke Circuit Court. The indictment was in five counts, each charging the appellant, Joseph Stout, with having, on the 24th day of November, 1882, feloniously killed and murdered one Taylor Dunbar, in Montgomery county. Upon several motions to quash each count, all the counts of the indictment were held to be sufficient. Trial by jury; verdict finding the defendant guilty of murder in the first degree, as charged in the first count of the indictment, and fixing the punishment at death.

After considering and severally overruling motions for a new trial and in arrest of judgment the court rendered judgment upon the verdict, naming the time and the place for the execution of the death sentence.

These latter proceedings were had on the 23d day of April, 1883, at which time sixty days time was given to the appellant in which to prepare and file bills of exceptions, making certain proceedings at the trial matters of record. Three bills of exceptions are copied into the transcript. One assumes to contain all the evidence given in the cause. Another contains certain special matters upon which questions were reserved during the progress of the trial. The third embraces the instructions given by the court to the jury. They all bear date, and purport to have been signed by the judge before whom the cause was tried, on the 23d day of May, 1883, but there is nothing in the transcript showing when they, or any of them, were filed, and for this reason counsel for the State make the point that these bills of exceptions are not properly in the record. It is a well recognized rule of practice in this court, that where time is given in which to prepare and file a bill of exceptions, the record must in some way affirmatively show that the bill of exceptions was filed within the time limited.

The transcript in this case was filed in this court on the 13th day of June, 1883, which was within the time limited for filing the bills of exceptions. The clerk's certificate to the transcript bears date the 7th day of that month, and certifies that the transcript to which it is attached "contains a full, true and complete transcript of the record, and all the proceedings and judgment of the court, and also the bills of exceptions in the case of the State of Indiana vs. Joseph Stout, No. 1053, indictment for murder, as the same are found on file and remain of record in my office."

According to the doctrine of the case of *Oliver v. Pate*, 43 Ind. 132, which we think was correctly decided, this certificate makes it appear affirmatively that the bills of exceptions in question were properly on file on the 7th day of June, 1883,

and that hence they were filed within the time limited by the court.

After this cause reached the Parke Circuit Court, the appellant made application to that court to be permitted to defend the proceedings against him as a poor person. This application was granted, and John R. Courtney, an attorney of that court, was appointed to conduct the defence for the appellant.

Upon his first appearance by counsel in this court, the appellant filed his application in writing, supported by his affidavit, to be permitted to prosecute this appeal as a poor person, and we have been asked to make formal ruling upon that application.

The subject of admitting litigants to prosecute or defend actions as poor persons is one over which this court has no original jurisdiction. We have no funds under our control out of which payment could be made for such services as those contemplated by section 260 of the present code.

The provisions of that section confer original and general jurisdiction only upon the *nisi prius* courts, and when a *nisi prius* court admits a litigant to prosecute or defend as a poor person, the privilege, unless revoked, extends to all the subsequent proceedings in the cause, including appeals to this court. Consequently, the privilege of defending as a poor person, granted to the appellant by the Parke Circuit Court, extends to the proceedings upon this appeal.

No question is made here upon the sufficiency of the indictment; hence, the question of its sufficiency has not been considered.

The appellant assigned as causes for a new trial:

*First.* That the verdict was contrary to law.

*Second.* That the verdict was not sustained by the evidence.

*Third.* That the court had permitted irrelevant, incompetent and immaterial evidence to be given to the jury to his prejudice and over his objection.

*Fourth.* That the court had excluded competent, material

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and relevant evidence from the jury, to his, the appellant's, prejudice, all of which appeared by the reporter's notes of the proceedings at the trial.

*Fifth.* That the court erred in allowing incompetent evidence to be given to the jury, and afterwards orally instructing them not to consider the evidence thus given to them because of its incompetency.

*Sixth.* That the court had erred in refusing to permit him to prove by John Stout, Elizabeth Stout, Dr. Stowe S. Dechon, Joel Stout, Edward Bly and other competent witnesses, the diseased condition of his mind at the time of and prior to the homicide charged in the indictment, as well as the general condition of his mind at that time.

*Seventh.* That the court, after excluding all the evidence offered as to the condition of his, the appellant's, mind at the time of the homicide, had refused to permit him "to file the following special written plea in paragraphs" (here insert), "to which ruling" an exception was at the time reserved.

*Eighth.* That the court had permitted the jury, upon retiring to consider of their verdict, to take with them the entire indictment, consisting of five counts, after the prosecuting attorney had in open court elected to stand upon the first and second counts only.

*Ninth.* That the court had erred in overruling his challenges for cause, on account of prejudice and opinion formed, to each of the following persons called as jurors, to wit: John Pence, J. H. Martin, D. McMullen and Frank Brown.

*Tenth.* That the court had erred in giving instructions to the jury from one to nineteen, both inclusive.

No argument is submitted in support of the first and second causes for a new trial assigned as above, and the third, fourth, fifth and seventh causes are too general and indefinite to present any question for our decision. As a reference to it will show, the seventh cause for a new trial does not set out the plea which the appellant asked leave to file, nor does it refer

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to or identify the plea in any other such a way as to make it a part of that cause for a new trial.

The questions reserved by the ninth cause for a new trial ought, in their natural order, to be first considered, in connection with the refusal of the court to grant a new trial.

John Pence, upon being sworn to answer questions as to his qualifications as a juror, said that he had formed an opinion as to the merits of the cause; that his opinion was formed from reading the Rockville newspapers, and talking with some of his neighbors; that he had never talked with any of the witnesses in the cause, or with any one who knew any of the facts connected with it; that he had no personal knowledge of the case in any way, and did not know any of the witnesses or parties. He was then asked if he felt able, notwithstanding his opinion thus formed, or any opinion he might have expressed, to render an impartial verdict upon the law and the evidence in the cause. To this he answered, "I judge not."

Acting seemingly upon the theory that Pence had not fully understood this last question, the prosecuting attorney propounded substantially the same question to him in a different form, to which he answered, "I feel able so far as I know about it."

He further said that he had no bias or prejudice against the appellant, and that he thought he could give him a fair trial upon the law and the evidence. He still further answered that it might require some evidence to change the opinion he had formed, but that if the facts as shown by the evidence should prove to be different from the statements upon which he had predicated his opinion, he thought his opinion as already formed would not influence his verdict.

Martin, McMullen and Brown severally answered under oath that they had formed opinions about the case, either from rumor merely or from reading the newspapers; that they had no bias or prejudice against the appellant, and that they thought they could give him a fair and impartial trial.

The answers of these last named persons, severally consid-

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ered, were less objectionable as regards their competency than were those of Pence. The court held them all, including Pence, to be competent jurors.

All the decisions of this court touching the competency of jurors, to which we are referred by counsel, were made under the criminal code of 1852, which was materially different from, and much less liberal than, the corresponding provision on that subject found in the criminal code of 1881, now in force.

This last named provision, constituting a part of section 1793 of the R. S. of 1881, is as follows:

"The following, and no other, shall be good causes for challenge to any person called as a juror in any criminal trial: \* \* \* \* *Second.* That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror state that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumors or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify; and the juror state on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

Under this provision of the statute of 1881, we see no objection to the competency of any one of the four persons above named and called as jurors in this case; at all events the facts presented by the answers of each one of those persons raised a question for the decision of the court in connection with the general appearance and the demeanor of the proposed jurors, and concerning which the provision, quoted as above, confers a judicial discretion, and there is nothing

disclosed from which we can infer any abuse in this case of the discretion thus conferred.

A murder case was recently tried in the State of Colorado in which one of the jurors who tried the cause, when he was called, stated that he had formed some opinion as to the guilt or innocence of the defendant; that he had formed his opinion from reports merely, and that it would require evidence to remove the opinion he had formed; that he, however, knew of no reason why he could not render a fair and impartial verdict according to the law and the evidence.

Upon an appeal the Supreme Court of that State said, amongst other things, in brief, that the question whether a juror has such an opinion as will require evidence to remove it, is one quite commonly propounded by attorneys; but is no certain or proper test of a juror's qualifications; that no rational person has an opinion upon any subject which is changed or removed except by evidence of some kind; that the time has gone by, if it ever existed, when a juror is held to be disqualified merely because he has heard or read something about the case he is called to try, and is intelligent enough to have formed some opinion about what he has heard or read; that in such a case the proper test is, can and will the juror render a fair and impartial verdict, according to the evidence to be adduced at the trial, regardless of his preconceived opinion? that if he can and will so decide upon the evidence, there is no ground for sustaining a challenge on account of any opinion he may have previously formed. *Jones v. State*, 16 Cent. L. J. 409.

These remarks are in evident accord with the spirit and meaning of section 1793, *supra*, of our present criminal code, and are for that reason applicable to the case before us. It may be said that the answers of Pence were not in all respects as positive and explicit as might have been desirable, but, taking them all together, they impress us as having afforded a reasonable assurance that he was both able and willing to

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render an impartial verdict. See, also, *Greenfield v. People*, 74 N. Y. 277.

At the trial John Stout, the father of the appellant and on his behalf, testified that the appellant had been subject to occasional attacks of epilepsy all his life. Other witnesses were then called to further testify on the same subject, and as to the nature and frequency of those attacks, but their testimony was excluded. Dr. Dechon, a practicing physician who had occasionally attended the appellant up to and as late as 1877, was also called as a witness by the appellant. He was asked, amongst other things, to explain what epilepsy is; the nature of the attacks with which the appellant had been afflicted; the effect which such attacks were liable to have upon the minds of those subject to them; also the condition of mind into which the appellant had been thrown by the disease, as well as the general mental condition of the appellant.

In connection with the enquiries made of this witness, as above enumerated, several separate and distinct propositions were submitted to the court as to matters expected to be proven by him, and in each case the proposed evidence was excluded. After this, however, the appellant, while testifying as a witness, was permitted to state the nature and extent of his affliction resulting from epilepsy, and the manner in which the disease had affected him, both physically and mentally.

As will be observed, the sixth cause for a new trial does not indicate any particular item of proposed evidence, making reference to the appellant's mental condition, as having been erroneously excluded. As applicable, therefore, to the various rulings made by the court touching the subject of the appellant's mental condition, the sixth cause for a new trial is too indefinite and uncertain to raise any question upon any particular item of, or proposition concerning, evidence which was rejected. In any event, the actual physical as well as the apparent mental condition of the appellant at the time of the homicide was either directly or otherwise brought to the attention of the jury by several witnesses, and in that respect

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we are unable to perceive that the appellant has any substantial cause of complaint.

As regards the eighth cause for a new trial, it may be said that the prevailing doctrine is that the question of the submission of books and papers to the jury is one which rests largely, and sometimes entirely, in the discretion of the court. Whart. Crim. Law, sec. 3308. But in this State the discretion of the court in that respect is more limited than in some of the other States. *Nichols v. State, ex rel.*, 65 Ind. 512.

We, however, know of no exception to the general rule that the court may permit the jury to take with them the pleadings in the cause when they retire to their room for final consultation. Thomp. & Mer. Juries, sec. 387. This general rule necessarily includes the indictment and all the papers properly attached thereto in a criminal cause.

The only objection urged to the first instruction given by the court is that it told the jury that the venue of the cause had been changed from Montgomery county by the appellant. That instruction did not, however, in terms so inform the jury; it only told them that the cause was before them on a change of venue from Montgomery county by order of the Montgomery Circuit Court, omitting all reference to the causes or proceedings which induced the change. The court had judicial knowledge of the fact that a change of venue had been taken in the cause, and it was proper that the fact should be communicated to the jury so as the better to enable them to apply the evidence relating to the venue of the alleged homicide.

The eighth instruction is the next one objected to in its order, and it was as follows:

“Homicide is a general term, and signifies simply the killing of one human being by another or by others, and is either justifiable, excusable or felonious. It is justifiable when done in the execution of lawful authority, or by one who, having been guilty of no offence himself, in the necessary defence of himself, to avoid imminent danger, real or apparent, of death

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or great bodily harm. There are other cases of justifiable homicide, but their further specification is unnecessary. Homicide is excusable when it is committed by one of two persons who have mutually and voluntarily engaged in an unlawful combat without any felonious purpose; and after they have mutually so engaged, one of them having become dissatisfied with it, and desirous to withdraw from it makes that desire manifest by abandoning the combat and retreating from his adversary, who nevertheless pursues him until at last he is compelled, in the necessary defence of himself from great bodily harm or death, to turn upon and slay his adversary. In such case the law, while it does not regard the slayer as entirely innocent, because he at first voluntarily engaged in the contest, yet, inasmuch as he subsequently, and before the fatal blow was given, did all he could to repair his original faults, the law excuses him because of the necessity under which he was placed by the act of the deceased. All other grades of homicide, which it is important for you to consider, are felonious and are distinguished from those which are justifiable or excusable, by being unlawful, and in this State are included in two classes, viz., murder and manslaughter."

The complaint made against this instruction is that it had no practical application to the facts of this case, and that for that reason it was calculated to confuse and mislead the jury. Without enquiring whether this instruction was in all respects applicable to the case made by the evidence, we see no reason for holding that it was calculated to mislead the jury to the prejudice of the appellant.

The eleventh instruction was as follows: "Voluntary manslaughter is the unlawful killing of a human being, without malice, express or implied—voluntary, upon a sudden heat, as upon *adequate* provocation the passion has been aroused, and the fatal act is unlawfully and voluntarily committed before sufficient time has elapsed to allow the passion to cool and for reason to resume its sway."

It is insisted that the words "as upon adequate provocation,"

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in the connection in which they are found, renders this instruction erroneous, insisting that where there is "adequate provocation" it is no crime to take human life.

It is true that the statute does not use the words objected to, nor equivalent words, in defining the crime of manslaughter. R. S. 1881, sec. 1908. But the words, as they are used in the instructions, are only illustrative of the kind of *sudden heat* necessary to reduce felonious homicide to manslaughter. The meaning evidently intended to be conveyed was that the *sudden heat* must be actual; that is, *as upon adequate provocation*. As thus construed and understood the instruction was not erroneous.

The fifteenth instruction given by the court reads as follows:

"Evidence is sufficient to remove a reasonable doubt when it convinces the judgment of an ordinarily prudent man of the truth of a proposition with such force that he would voluntarily act upon that conviction, without hesitation, in his most important affairs. If would be unsafe to convict any person of a felony when the facts proved and the supposition of guilt simply afford a solution of what would otherwise be mysterious; but when the facts proved are susceptible of explanation, upon no reasonable hypothesis, consistent with innocence, and point to guilt beyond any other reasonable solution, then they are sufficient to rest a conviction upon, although the crime is of the utmost malignity and the penalty attached is the highest known to the law. This principle should guide the jury in determining the degree of an offence, as well as the question as to whether the accused is guilty of any offence.

"When there is a reasonable doubt whether a defendant's guilt has been satisfactorily shown, he must be acquitted; and when there is a reasonable doubt in which of two or more degrees of an offence he is guilty, he must be convicted of the lowest degree only."

The appellant concedes that this instruction is fully supported by the case of *Jarrell v. State*, 58 Ind. 293, but nevertheless maintains that it does not state the law correctly on

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the subject of reasonable doubts in a criminal cause, and that, for that reason, the case of *Jarrell v. State, supra*, ought to be overruled.

No other or more specific objection is urged to the instruction, and we observe no substantial objection to it in our examination of it. We, therefore, assume that it was not erroneously given.

The eighteenth instruction given was the following:

“It is proper for the court to remind you that the issue in this cause is to the defendant of so grave a nature, and to the public safety of such vital importance, that upon your part there should be no error. The accused, if he be innocent, ought not to be erroneously convicted, and, on the contrary, if he be guilty, he ought not to be erroneously acquitted. You were, after careful effort, selected as intelligent and qualified jurors, sworn to impartially try and determine this cause, and a true verdict render according to the law and the evidence. If you comply with your oaths, error against either side must be precluded. Remember that the defendant's life and liberty are his most sacred and highest rights, and can only be forfeited by him for the causes, upon the conditions and in the manner prescribed by law. In considering his rights do not forget that by each acquittal of a guilty criminal the safeguard erected by society for its protection is weakened; for, by the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the very class that it is intended to restrain. The evidence has been placed before you; an exhaustive discussion of the facts by counsel on either side, has been had in your hearing, and such instructions as in the judgment of the court would aid you in arriving at a correct decision have been given.”

The appellant argues that this instruction in effect told the jury that he was a guilty criminal, and that public policy demanded his conviction. In our opinion the instruction can not have such a construction fairly placed upon it. The instruction, taken as a whole, constituted a careful and unob-

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jectionable admonition to the jury of the importance of the cause they had been called upon to decide, considered first with reference to the rights of the appellant, and next to the interests of society, for the protection of which laws had been enacted. Both aspects of the case appear to us to have been fairly presented, and we see nothing in the instruction of which the appellant has any just cause of complaint.

A merely verbal criticism is made upon the nineteenth and last instruction, in which the jury was told that in case they found the appellant guilty of murder in the first degree they might assess the penalty at death, or imprisonment in the State's prison during life, in their "description." The word "description," in the connection in which it is found in the record, is so obviously a clerical inadvertence, and so entirely meaningless in any application which can be given to it in that connection, that we regard its relation to the instruction as wholly immaterial. The instruction was sufficient independently of that word and those other words immediately preceding and dependent upon it, all of which may be regarded as mere surplusage.

We have gone carefully through the record, and find no cause for a reversal of the judgment.

The judgment is affirmed with costs.

#### ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The appellant complains that the construction we have given to the second clause of section 1793, of the Revised Statutes of 1881, is in violation of those provisions of the Constitution of this State and of the Constitution of the United States, which guarantee to every person prosecuted for a criminal offence a trial by an impartial jury.

While the clause in question differs very greatly in its phraseology from its corresponding provision in the criminal code of 1852, it amounts to little, if anything, more than a substantial re-enactment of the latter provision, with the constructions added which had been given to it from time to time

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by the courts. The object of its enactment was to afford a well defined judicial method of ascertaining whether a person called to act as a juror is impartial within the meaning of the Constitution of the State as well as of the United States, and to declare what is necessary to constitute a person so called a competent juror, having reference to his impartiality in the cause.

The constitution does not assume to prescribe more than that a juror must be impartial, leaving it to the Legislature and to the courts to declare the condition of mind which constitutes impartiality as applied to persons called to serve as jurors.

The clause of section 1793, *supra*, as construed by us, and to which objection is made, is really in aid, and, consequently, not subversive, of the constitutional guaranties that a jury in a criminal cause shall be impartial.

It was insisted in argument that the bill of exceptions shows that only four persons were sworn as jurors in the cause, and that for that reason the verdict could not be sustained, and it is now objected that no reference was made to that point at the former hearing.

In the first place, the record of the trial, as made by the clerk, shows that twelve duly qualified persons were called and sworn as jurors to try the cause, and there is nothing contradictory of this recital in the bill of exceptions.

In the next place, no question was made upon the motion for a new trial either upon the organization or the legality of the jury, and hence there was no such question as that argued in the record. 1 Graham & Wat. New Trials, pp. 9 and 10.

A motion in arrest of judgment raises no question except upon the jurisdiction of the court and upon the sufficiency of the indictment. R. S. 1881, section 1843.

Other questions have been argued and incidentally considered, but what we have said practically disposes of every question fully and fairly presented by the record.

Counsel for the appellant has displayed great zeal and earnestness in the prosecution of this appeal, and the cause has

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been ably and elaborately argued on behalf of the State as well as the appellant. We have given the cause that careful consideration which its importance has demanded. The evidence presents a most revolting case in its details, and appears to have fully justified the verdict. The judgment is one, therefore, which ought not to be reversed except for some palpable error which would afford a dangerous precedent. Nothing has been shown which would justify us in reversing the judgment.

The petition for a rehearing is overruled.

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No. 10,870.

**WOLFE, AUDITOR OF STATE, v. THE STATE, EX REL. KENNARD, TREASURER.**

**COUNTY COMMISSIONERS.**—*Erroneous Payments by County Treasurer.*—*Certificate of County Auditor.*—*Duty of Auditor of State.*—*Duty of State Treasurer.*—Under the provisions of sections 6510 and 6511, R. S. 1881, whenever it appears to the board doing county business, in any county, that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the county auditor is required, under the order and direction of the county board, to certify, under his seal of office, such improper or erroneous payments to the Auditor of State, whose duty it is to audit and allow the same as a claim against the State Treasurer, and he is required to pay such claim out of any moneys not otherwise appropriated.

**SAME.**—*Judicial Duties.*—*Ministerial or Administrative Functions.*—In ascertaining that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the county board does not sit as a court nor discharge judicial duties, but merely performs the ministerial or administrative functions of such county board, under sections 5916 and 5917, R. S. 1881, in the inspection and examination of the office and books of such county treasurer.

**SAME.**—*Ministerial Duty.*—*Judicial Power.*—*Mandate.*—Where the county auditor, under the direction of the county board, has certified to the Auditor of State that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the Auditor of State has no judicial power, under the statute, over the claim so certified; but it

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is the plain ministerial duty of the State Auditor to audit and allow such payments as a claim against the State Treasurer, and if, upon reasonable request, the State Auditor refuse to issue his warrant for such payments so certified, he may be compelled by mandate to perform his duty.

**SAME.**—*Certificate of County Auditor.*—*Defence.*—*Fraud or Mistake.*—Where the county auditor, under his seal of office and by the direction of the county board, certifies that improper or erroneous payments have been made by the county treasurer to the State Treasurer, such certificate is *prima facie* right and correct and binding upon the Auditor of State, and it can not be impeached or successfully defended against, except upon the grounds of fraud in its procurement or issue, or of mistake therein.

From the Superior Court of Marion county.

*F. T. Hord*, Attorney General, for appellant.

*A. C. Harris* and *W. H. Calkins*, for appellee.

**Howk, J.**—In the verified complaint of the appellee's relator in this case, he alleged, in substance, that he was the treasurer of Carroll county, and the appellant was the Auditor of State of the State of Indiana; that, during the years 1878, 1879, 1880 and 1881, many of the owners of real estate in Carroll county did not pay the taxes legally assessed for State and county purposes, and their lands were, therefore, advertised for sale in the manner and form provided by statute, and the legal costs for such advertising were charged against, and made a lien upon, such lands; that Carroll county paid the costs and expenses incurred in making such advertisements, from year to year as required by law, out of the county funds; that, by law, the Auditor of State was required to furnish proper forms and blanks for the county officers to make to such Auditor their semi-annual statements; that the forms so provided for the years aforesaid, failed to notice or make any provision for the retention by the county, out of the taxes collected by the county treasurer, the several aggregate amounts received on account of the costs of advertising lands thereon as aforesaid and collected by the treasurer, and thereby the county was required to account with and report to the Auditor of State and pay over to the State Treasurer, on said

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several statements, the State's aliquot part of the gross sum of taxes and printer's fees added and collected at the same time; whereas the county was entitled to withhold and retain the sum so collected on account of charges added for costs of advertising.

The relator further alleged that, on the 2d day of January, 1882, the board of commissioners of Carroll county, being in lawful session, and the matters aforesaid having been brought to its notice, proceeded to investigate the same, and it then and there appeared to such board, by clear and sufficient proof, that the mistakes aforesaid had been made by the treasurer of such county in making his settlements for the years aforesaid, in which he had accounted for and paid to the State more money than was justly due the State, to wit: For 1878, \$124.45, for 1879, \$279.50, and for 1881, \$271.80; and that thereupon the county board made an order setting out the facts aforesaid, and directing the county auditor to certify the same, under his seal of office, to the Auditor of State, which was done accordingly. A copy of such order and certificate was set out at length in the relator's complaint.

The relator further averred that afterwards the said order was duly presented to the Auditor of State, at his office, and demand was properly made upon him to audit and allow the the same as a claim against the Treasurer of State, but the Auditor of State, wholly disregarding his duty in the premises, refused so to do, although there was sufficient money in the State treasury, not otherwise appropriated, to pay the same, and he also refused to receive, audit and allow the claim, so that the county might take credit on the next settlement to be made with the State officers. Wherefore the relator prayed that a writ of mandate be issued, directing and requiring the Auditor of State to audit and allow the aforesaid claim in favor of Carroll county, and for other proper relief.

The cause was put at issue and tried by the court at special term, and a finding was returned by the appellee's relator, and judgment was rendered accordingly, requiring the appel-

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lant, and his successor in office, to audit and allow the aforesaid claim in favor of Carroll county, and draw his warrant therefor on the State treasury, in favor of the relator or his successor in office. On appeal this judgment was affirmed by the court in general term, and from the judgment of affirmance this appeal is now here prosecuted.

The relator's complaint is founded upon the order of the board of commissioners of Carroll county, certified by the county auditor, under his seal of office, to the Auditor of State, and the refusal of the appellant, as State Auditor, to audit and allow the claim therein preferred as a claim against the State Treasurer. It is claimed by the relator that the order of the county board in the premises was fully authorized by the provisions of sections 6510 and 6511, R. S. 1881, and that, under those sections, it became and was the statutory duty of the appellant, as the Auditor of State, upon the presentation to him of such certified order, to "audit and allow the same as a claim against the State Treasurer." These sections of the statute provide as follows:

Sec. 6510. "Whenever it shall appear to the board doing county business in any of the counties of this State, by clear and sufficient proof, that, by reason of erroneous charges in the tax duplicate, or from any other cause, the treasurer of such county has paid and accounted to said board for more money than was justly due from him on account of county revenue, said board doing county business shall direct the auditor to credit said treasurer with the sum or sums thus improperly paid, and order the same to be refunded from the county treasury."

Sec. 6511. "Whenever similar improper or erroneous payments have been made by any county treasurer to the State Treasurer, the board doing county business shall direct the auditor to certify said improper or erroneous payments to the Auditor of State, under his seal of office, who shall audit and allow the same as a claim against the State Treasurer, and said treasurer shall pay the same out of any moneys not otherwise appropriated."

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The order of the board of commissioners of Carroll county, as certified by the county auditor, under his seal of office, to the Auditor of State, and set out in the relator's complaint, substantially conforms to and complies with the provisions of the above quoted sections of the statute. The order of the county board and the certificate of the county auditor were in substance as follows:

"STATE OF INDIANA, CARROLL COUNTY, ss:

"Commissioners' Court, January Special Term, 1882.

"In the matter of settlement with State Treasurer:

"Be it remembered that, heretofore, to wit, at the commissioners' court, January special term, 1882, held at the courthouse in the city of Delphi, and on the first day of said term, being the 2d day of January, 1882, and, among other things, the following were had, to wit:

"Whereas, It has been the custom of Carroll county to add the costs of advertising delinquent lands and town lots for sale to the delinquent taxes upon the several tax duplicates, at each advertisement, thereby augmenting the delinquent taxes on such lands and lots to the extent of said costs of advertising thus added; and,

"Whereas, There are a number of tracts upon which the taxes are being paid from time to time, which have been advertised a number of times before said payments are made, on which the costs of advertising amount to a large percentage of the sum of said taxes when paid; and,

"Whereas, The county is compelled to pay the publisher out of the county treasury, the costs of such advertisements, thereby making such amounts as have been added to the delinquent taxes as above mentioned a specific county fund; and,

"Whereas, The auditor and treasurer, in making the distribution of the delinquent taxes collected and settled for on the May and December settlement sheets for 1878, 1879 and 1881, distributed said delinquent taxes to the various funds represented on the tax duplicates, including in said distribution said cost of advertising which had been added to the

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delinquent taxes as aforesaid, and collected at each of said settlements in May and December, 1878, 1879 and 1881; and,

“Whereas, It has been the practice of all the counties of this State to deduct the cost of advertising delinquent lands each year from the gross collections of delinquent taxes as shown upon the May settlement sheets of each year, before distributing said delinquent taxes to the several funds entitled thereto, thereby reimbursing said counties for said costs which had been added to the delinquent taxes and distributed to the various funds as heretofore mentioned. This custom of adjusting said account and reimbursing the county was made necessary by the forms of settlement sheets as prepared by the respective State Auditors, and has been the practice for a great many years; and,

“Whereas, There was no provision made in the May settlement sheets of 1878, 1879 and 1881, for deducting the costs of advertising the delinquent lists of these years from the delinquent taxes collected and settled for on said May settlement sheets of 1878, 1879 and 1881, thereby compelling said Carroll county to pay to the State and various funds other than county revenue a large proportion of said costs of advertising, which was collected at said May and December settlements of 1878, 1879 and 1881, which costs so collected, rightfully and justly belong to the county revenue of Carroll county; and,

“Whereas, The said costs of advertising delinquent lands and lots in Carroll county, for the years hereinafter named, are as follows, to wit:

For the year 1878 . . . . .	\$124.45
For the year 1879 . . . . .	279.50
For the year 1881 . . . . .	271.80

Total . . . . .	\$675.75
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“Now, therefore, the board of commissioners of Carroll county, being in lawful special session on this, the 2d day of January, 1882, it is ordered by said board, after a careful ex-

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amination of the foregoing statement, that it does appear to said board by clear and sufficient proof, that erroneous payments have been made by the treasurer of Carroll county to the Treasurer of State, to the extent of the collections of the costs of advertising delinquent lands and lots, which have been paid to said State Treasurer at the May and December settlements, in the years 1878, 1879 and 1881.

"And it is further ordered by the board that the auditor of Carroll county be hereby directed to certify to the Auditor of State said erroneous payments, as above set forth, under his seal of office, and that said Auditor of State be requested to pay the same to the treasurer of Carroll county, or, at his option, to allow said Carroll county to deduct said costs of advertising for each of said omitted years from the May settlement sheet in 1882, in accordance with the manner of adjusting said account and reimbursing said Carroll and other counties for said costs for more than twenty-five years immediately preceding the year 1878, as shown by the settlement sheets now on file in the office of the Auditor of State.

"STATE OF INDIANA, CARROLL COUNTY, ss:

"I hereby certify that the foregoing is a complete and true copy of the order of the board of commissioners on record in my office in relation to said matter. Given under my hand and official seal, at Delphi, this 22d day of March, 1882.

[SEAL.]

"H. DUNKLE,

"Auditor Carroll County."

By a proper assignment of error here, the appellant has brought before this court the errors assigned by him in the court below in general term, in substance, as follows:

1. The court erred in refusing to require the plaintiff to make his complaint and writ more specific, by giving a statement of the items for which the board of commissioners of Carroll county made an allowance.

2. The court erred in overruling a demurrer filed by appellant to the complaint and writ in this cause.

3. The court erred in sustaining a demurrer to the second

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paragraph of defendant's return to the alternative writ herein.

4. The court erred in overruling defendant's motion for a new trial.

5. The finding of the court was contrary to law.

6. The finding of the court was contrary to the evidence.

We will consider and decide the several questions presented and discussed by the learned counsel of the appellant, in his elaborate and exhaustive brief of this cause, and arising under the alleged errors, in the order of their assignment.

1. The record shows that at the proper time the appellant moved the court at special term to require the appellee's relator to make his complaint more specific, in the following particulars:

"*First.* To give an itemized statement of the cost of advertising delinquent lists, setting forth the name of each delinquent taxpayer, whose land was advertised for sale for the payment of taxes, of whom the cost of advertisement was collected, and of which part was paid into the State Treasury; and what proportion, collected from each person, was paid over to the State Treasurer; also a statement of the full amount of such cost collected off of delinquents, and paid into the State Treasury, to enable the defendant to defend against the same; and for the reason that the action of the board is a judgment in its own favor upon its own claim, and it is not authorized to act thereon, and its judgment is void, being *ex parte*, without notice and against public policy.

"*Second.* To require the petitioner to give an itemized statement of his claim, or a bill of particulars, for the reason that the defendant can not audit without inspection of the claim, and it is the duty of the auditor of the county to certify up a statement of the items, as the defendant can not determine whether the money was improperly or erroneously paid to the State Treasurer, and the judgment of the commissioners is not conclusive on the defendant.

"*Third.* That petitioner be required to specifically set

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forth and separate the amount paid to the State Treasurer of the costs collected from delinquent taxpayers, and that part of the costs of advertising the delinquent tax lists not collected of said delinquents, for the reason that the State is not liable for the cost of advertising the delinquent lists, but the county of Carroll must pay the entire cost of advertising such sales."

We are of opinion that the court did not err in overruling this motion. The first two points specified in the motion proceed upon the theory that the county board acts judicially in ascertaining, under the provisions of section 6511, above quoted, that improper or erroneous payments have been made by the county treasurer to the State Treasurer, and in directing the county auditor to certify such payments to the Auditor of State, to be audited and allowed, and paid by the State Treasurer out of any moneys not otherwise appropriated. Upon this theory, it is claimed that the action of the county board, in such case, is a judgment in its own favor upon its own claim, and that such judgment is void, being *ex parte*, without notice and against public policy. But this theory, as it seems to us, is not authorized by the provisions of the statute. The county board does not act judicially or as a court, under the provisions of the section quoted, in ascertaining that improper or erroneous payments have been made by the county treasurer to the State Treasurer, and its direction to the county auditor to certify such payments to the Auditor of State is not a judgment either in form or substance. In section 5916, R. S. 1881, it is made the duty of the county treasurer to "so arrange and keep his books that the amount received and paid out on account of separate and distinct funds or specific appropriations shall be exhibited in separate accounts;" and in the next section, 5917, it is provided that "He shall, at all times, keep his books and office subject to the inspection and examination of the board of county commissioners; and shall exhibit the money in his office, to such board, at least once each year."

Under these sections of the statute, it is made the duty of

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the county board to inspect and examine the books of the county treasurer, showing the amounts received and paid out by him on account of the separate and distinct funds. If it appear, upon such inspection and examination, that improper or erroneous payments have been made by the county treasurer to the State Treasurer, then, under section 6511, above quoted, it is made the duty of the county board to direct the county auditor to certify such payments to the Auditor of State, under his seal of office, to be audited and allowed as a claim against the State Treasurer, and by him paid out of any moneys not otherwise appropriated.

The duties imposed upon the county board by these statutory provisions, we think, are clearly ministerial and not judicial. In *Shoemaker v. Board, etc.*, 36 Ind. 175, in construing a section of a former statute, identical in its terms with section 6511, *supra*, this court said: "But the remedy provided for obtaining money that has been improperly paid into the State treasury is a special one, and must be strictly pursued. It does not contemplate a resort to the courts. The matter must be presented to the board doing county business, which shall direct the county auditor to certify such improper or erroneous payment to the Auditor of State, under his seal of office, who shall audit and allow the same as a claim against the treasury, and the treasurer shall pay the same out of any moneys not otherwise appropriated. There is a valid appropriation as provided by the constitution, but the remedy provided must be strictly pursued, or the Auditor of State would have no power to audit such claim. No power is conferred upon the courts to take jurisdiction, or render any decree in the premises. If the Auditor of State should refuse to audit such claim he might be compelled to do so by mandate." *Adams v. Board, etc.*, 46 Ind. 454.

In the case at bar, it is shown by the complaint that the remedy provided in section 6511, above quoted, was strictly pursued by the county board of Carroll county, and that under its direction the county auditor certified

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under his seal of office, to the Auditor of State, the improper and erroneous payments made by the county treasurer to the State Treasurer. The action of the county board and county auditor, in the premises, is *prima facie* right and correct, we think, and constitutes the basis of the relator's action. When the order and certificate were presented to the Auditor of State, it became his duty under the statute to audit and allow the amount certified as a claim against the State Treasurer. The case is not one in which the Auditor of State was entitled to any bill of particulars. The order and certificate, made under and in conformity with the statute, were the foundation of the relator's action, and these were set out in his complaint.

The third point in the motion to make more specific is founded upon the assumption that the order and certificate, set out in the complaint, embrace moneys which had not been collected from delinquents, and had not, therefore, been paid to the State Treasurer. This assumption was not warranted, we think, by anything alleged in the relator's complaint.

What we have already said, we think, disposes of the alleged error of the court, in overruling appellant's demurrer to the relator's verified complaint and alternative writ, as these pleadings were certainly sufficient to entitle the relator to some relief. It was shown thereby, clearly and unequivocally, that moneys belonging to the county fund of Carroll county had been paid by the county treasurer to the State Treasurer; that such payments were improper and erroneous; that, in strict conformity with the provisions of sections 6510 and 6511, above quoted, the county board of such county had ascertained the amount of such payments, and had directed the county auditor to certify the same, under his seal of office, to the Auditor of State; and that, upon the presentation of such order and certificate, the State Auditor had refused to audit and allow the same as a claim against the State Treasurer. The complaint and alternative writ were each sufficient, we think, to withstand the appellant's demurrer thereto.

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It is claimed by the appellant's counsel that the court erred in sustaining a demurrer to the second paragraph of the answer or return to the complaint and alternative writ. In this paragraph the appellant stated in substance that the claim set out in the complaint was the property of the board of commissioners of Carroll county; that the county board was the owner of such claim, and the only party in interest connected therewith, and would receive, have and own the money by the enforcement of its judgment; that the county board, being the owner of such claim, could not hear, settle, adjust and determine such claim against the State, or in any way act thereon, and had no jurisdiction thereof; that the State of Indiana, through its officers or otherwise, had no notice of the pendency of such claim before the county board prior to its action thereon; that the proceeding before the county board was not binding on the appellant as to the existence, accuracy, legality or justice of such claim; that the appellant, as the Auditor of State, was the only person, tribunal or authority authorized to audit, hear and allow or disallow such claim; that prior to the institution of this suit the relator presented the order of the county board to the appellant, and no other or different claim, and did not present any itemized statement of such claim; that, on the presentation of such claim to the appellant, as such auditor, prior to the institution of this suit, the appellant examined, investigated and heard such claim, and, in the exercise of his judgment and discretion in the matter, without malice, honestly and in good faith, he disallowed and refused such claim; that the action of the appellant thereon was final and conclusive; and, therefore, the appellant demanded judgment.

The court committed no error, as it seems to us, in sustaining the relator's demurrer to this answer or return of the appellant. It states no fact which shows, or tends to show, any error, mistake or fraud either in the order of the county board or the certificate of the county auditor, and such order and certificate can not be attacked or impeached, we think, except

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for error, mistake or fraud therein. We have already said that the county board does not act judicially, but simply in the discharge of a ministerial or administrative duty, in ascertaining that improper and erroneous payments have been made by the county treasurer to the State Treasurer, and in directing the county auditor to certify such payments, under his seal of office, to the Auditor of State. The General Assembly, the sovereign power of the State, in the statutory provisions above quoted, expressly authorized the action of the county board of Carroll county in the premises; and although such action was not, as we think, a judgment, yet, *prima facie*, it was correct and right, and binding and conclusive upon the Auditor of State, unless he could show error, fraud or mistake therein. It was the plain, statutory duty of the appellant, as the Auditor of State, to audit and allow the relator's claim as certified by the county auditor, under the direction of the county board, as a claim against the State Treasurer, and none of the facts alleged by him, in the second paragraph of his answer or return, were sufficient to excuse his non-performance of such duty. In such a case as this we think the county treasurer is a proper relator to enforce the repayment into the county treasury of money belonging to the county fund.

The only question properly presented for decision, by the alleged error of the court in overruling appellant's motion for a new trial, is the sufficiency of the evidence to sustain the finding of the court. Upon this question we have no doubt. The order of the county board and the certificate of the county auditor, with the appellant's admission that he had refused to audit and allow the same as a claim against the State Treasurer, made a *prima facie* case for the appellee's relator. No evidence was offered for the purpose of showing error, fraud or mistake in such action of the county board. Upon the evidence, therefore, the court was bound to find, we think, as it did, for the appellee's relator.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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Mount, Trustee, v. The State, *ex rel.* Richey.

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No. 9,661.

**MOUNT, TRUSTEE, v. THE STATE, EX REL. RICHEY.**

CONSTITUTIONAL LAW.—*Special Laws.*—*Mandamus.*—*Township Trustee.*—Special laws for the relief of local officers, without whose fault public funds for which they are responsible have been lost, are constitutional and valid; and where the officer, a township trustee, has supplied the lost funds, a special act directing that the amount be refunded to him out of the funds of the township may be enforced by mandamus.

From the Scott Circuit Court.

*W. K. Marshall* and *W. Trulock*, for appellant.

*C. L. Jewett* and *H. E. Jewett*, for appellee.

ELLIOTT, J.—William J. Richey, the relator, was the trustee of Finley township, and as such deposited, as his predecessors for a long time had done, funds of the township in a private bank of another State; the bank failed, the money was lost, and Richey reimbursed the township. The taxpayers petitioned the Legislature to refund the money to him, and, in accordance with the prayer of the petition, an act was adopted directing that the township trustee should refund it; the trustee refused, and Richey applied for and received a writ of mandate.

It is true that public officers are bound at their peril to safely keep the public money entrusted to their custody. *Halbert v. State, ex rel.*, 22 Ind. 125; *Inglis v. State, ex rel.*, 61 Ind. 212. It may be true that the policy of refunding money to an officer who has lost it by the failure of a bank is a vicious one and to be condemned, but it affords no ground for overturning a legislative enactment. Courts can not overthrow legislative acts upon the ground that they are vicious in their policy or evil in their tendencies. *County of Livingston v. Darlington*, 101 U. S. 407. Statutes must stand unless found repugnant to some express provision of the Constitution. A learned judge of this State has stated with unusual clearness and vigor the rule on this subject: "The legislative authority of this State," said he, "is the right to exercise supreme and sovereign

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130	447
90	29
137	571
138	337
90	29
143	315
90	29
151	155
151	266
90	29
158	129
158	437
90	29
161	624

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power, subject to no restrictions except those imposed by our own Constitution, by the Federal Constitution, and by the laws and treaties made under it." *Beauchamp v. State*, 6 Blackf. 299.

The claim of the relator could not have been enforced by an action prior to the adoption of the act passed for his relief, and if it be true, as contended, that the Legislature can only provide for the payment of claims enforceable by a civil action, this appeal must be sustained. But this is not true. In *Town of Guilford v. Supervisors, etc.*, 13 N. Y. 143, it was said: "The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good." This, although too broadly stated, is the doctrine of the cases of *Thomas v. Leland*, 24 Wend. 65; *Brewster v. City of Syracuse*, 19 N. Y. 116; and *New Orleans v. Clark*, 95 U. S. 644. We do not approve the doctrine to the extent it is carried in the extract quoted, but we do hold, that in so far as it declares that the Legislature is not confined in the allowance of claims to such as are enforceable by action, the decision is correct. This general principle is involved in, and sustained by, the cases to be presently noticed.

It would be a violation of the principles underlying our governmental structure for courts to sit in judgment on the action of the Legislature allowing relief to individual claimants against the State or its funds, and review their decision solely upon the ground that there was no legal foundation for the claims. A conflict would result which would produce endless confusion and serious disaster.

The granting of relief to individual claimants is not

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within the provision of our Constitution, which prohibits the enactment of special laws. Each claim stands on its own merits; a general law could not be made applicable, and when general laws are not applicable special ones may be enacted. It is only where general laws are applicable that special laws are forbidden.

Township business can not be regulated by special or local laws, but a law requiring reimbursement to an officer is not a regulation affecting township business; it is an act granting special relief in a particular case. The term "business," as employed in the Constitution, does not apply to acts granting relief in particular and extraordinary cases. The term "business," when applied to a public corporation, signifies the conduct of the usual affairs of the corporation, and the conduct of such affairs as commonly engage the attention of township and county officers. It does not mean the performance of an act which can be done only in a particular case and by authority of a special law.

Reimbursing a public officer for the loss of public funds, occurring while he is engaged in discharging public official duties, can not be deemed an appropriation to private purposes. It was decided in *Board, etc., v. McLandsborough*, 36 Ohio St. 227, that the Legislature may exonerate from responsibility a public officer who has lost public money, and that there is no constitutional provision infringed in the adoption of such an act. The court declared that such a power was a purely legislative one, and added that, "Indeed, it is difficult to fix any limit to the power of the General Assembly in this respect, where the funds so lost were raised by taxation, which, as we have said, is clearly a legislative power." It is, perhaps, true, that the Legislature can not authorize the assessment of a tax for a mere private purpose, but that is not the case before us. It is quite clear that the Legislature might have provided in what case township officers should not be responsible, and if this be so it must necessarily follow that the matter is a public one.

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Mount, Trustee, v. The State, *ex rel.* Richey.

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Township officers are agents of the sovereign power, and the money in their hands is, for public purposes at least, in the control of the sovereign. It is a mistake to suppose that money derived from the taxation of the citizens of a township or county is beyond legislative control. In the case of *Lucas v. Board, etc.*, 44 Ind. 524, it was decided that funds derived from taxation are under legislative control, and the court approved the case of *Dennis v. Maynard*, 15 Ill. 477, where it was said: "The State does not allow itself to be sued, but it may hear, investigate and determine its own indebtedness, and assume the debts due to, or from others. So it may direct the county authorities to ascertain and allow just claims upon the public treasury, or may ascertain and fix that amount," and direct the raising of means, by taxation, for its payment. The public, county, and township funds are under legislative control, and so decided in *The County of Pike v. The State*, 11 Ill. 202; and *The County of Richland v. The County of Lawrence*, 12 Ill. 1." Another case, approved and adopted in *Lucas v. Board, etc.*, holds this doctrine: "The General Assembly, having the legislative power of the State, determines to what local uses the county funds shall be applied. Its determination and direction may operate unwisely, harshly and unjustly, but that is no argument against its power to direct." This general doctrine is carried very far in the case of *City of Indianapolis v. Indianapolis Home, etc.*, 50 Ind. 215, wherein it is held that funds of the city may be directed to be paid to a charitable corporation. The subject here under discussion was considered in the case of *New Orleans v. Clark*, 95 U. S. 644, and it was said: "A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the Legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the Legislature only exercises

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Mooney v. Kinsey.

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a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent."

This case presents no question as to the right of the Legislature to divert township funds to any other than local or township purposes, and although some of the opinions quoted in *Lucas v. Board, etc.*, seem to hold that such funds may be directed to any purpose, general or local, we, in referring to them, do not mean to be understood as approving them to that extent; we do no more than decide that the Legislature has power to direct the application of township funds to the payment of claims growing out of the discharge of official duties by the trustee, where the claims are of a public nature.

Judgment affirmed.

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No. 10,462.

## MOONEY v. KINSEY.

**SUPREME COURT.**—*Exception.*—*Witness.*—A question was put to a witness, and answered without any objection thereto so far as appeared by the bill of exceptions, save that after the answer it was stated that "the plaintiff excepted to the ruling."

*Held*, that this presented no question for the Supreme Court.

**HARMLESS ERROR.**—*Instruction.*—An instruction, which is erroneous because it is without the issues and too favorable to the appellant, is harmless as to him.

**NEW TRIAL.**—*Newly-Discovered Evidence.*—*Surprise.*—Newly-discovered evidence, or surprise, which concerns a matter merely incidental, and which would exert but the slightest, if any, effect upon the cause, is not sufficient ground for a new trial.

From the Henry Circuit Court.

*J. M. Brown*, for appellant.

*J. Brown* and *W. A. Brown*, for appellee.

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ZOLLARS, J.—This action was commenced in the court below, by appellant against the appellee, to recover upon a promissory note, and to foreclose a mortgage given, as it purports, to secure the note.

The complaint is in the usual form in such actions. Appellee pleaded want of consideration, to which appellant replied by a general denial. Trial; verdict and judgment for appellee.

The only error assigned is the overruling of a motion for a new trial.

Counsel for appellant insists that the judgment should be reversed on the evidence. We have read the evidence, as contained in the record, and find the testimony of different witnesses squarely and sharply in conflict upon the question of consideration. In such case, under the well established rule, this court can not disturb the verdict upon the weight of the evidence. We may remark, moreover, that there is nothing in the record showing that the mortgage described in the complaint was put in evidence; there is no copy of it in the record except the exhibit filed with the complaint. The only statement upon the subject is as follows: "The mortgage from Kinsey to Mooney, record 13, page 293, was offered in evidence by counsel for plaintiff, objected to by counsel for defendant, which was sustained, and excepted to by counsel for plaintiff." The exclusion of the mortgage was not assigned as a cause for a new trial.

If we should put a strict construction upon the record we could not say that the note described in the complaint was offered or read in evidence.

Upon the trial of the cause, D. W. Chambers, Esq., was a witness for the defence. After stating that he was present when the mortgage was executed, and heard a conversation between the parties as to the purpose of its execution, and the consideration therefor, and that he could not state the exact words used, he was asked to give his recollection of the substance of what occurred. It is insisted now that in permit-

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ting this question, and the answer thereto, the court below committed an error. The record does not show that any objection was interposed in the trial court to either the question or answer. Possibly, there may have been such objections, but the record comes to us as an absolute verity, and we are bound by it. Following the answer to the question, there is an exception to "the ruling." This indicates that appellant intended to preserve a question upon the competency of the testimony, but such an exception is unavailing, unless the evidence was at the time objected to.

It will not be necessary, therefore, for us to decide anything in relation to the competency of the testimony.

It is further insisted by appellant that the third and fourth instructions of the trial court were erroneous, and that the judgment should, on that account, be reversed. The substance of these instructions is, that if the note and mortgage were given without consideration, the verdict should be for the defendant, *unless* they were given and accepted with the intention of defrauding the creditors of appellee, he not having sufficient property, aside from that mortgaged, to pay his debts, in which event the verdict should be for the plaintiff, notwithstanding there may have been no other consideration.

It is argued that these instructions were without the issue, as made by the pleadings, and, therefore, erroneous, and that in any event they do not state the law correctly. In connection with evidence tending to show a want of consideration, there was evidence tending, in some degree, to show that the note and mortgage were executed for the sole purpose of securing to the wife of appellee the property mortgaged. It is not clear just how that object was to be accomplished. There was evidence further tending in some degree to show that appellee was in financial trouble, and that there was danger of his creditors taking the property mortgaged.

It was in view of this testimony, we presume, which was admitted without objection, that the instructions were given. It will not be necessary for us to decide either of the objec-

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tions urged against these instructions, as the error, if error, is so clearly harmless to appellant.

In a former instruction, the jury was charged that the burden of proving a want of consideration was upon appellee. In the instructions complained of, the jury was charged, properly, that if the note and mortgage were given without consideration, there could be no recovery. The court did not stop here, but instructed the jury that notwithstanding there may have been no consideration, yet appellant might still recover, if the note and mortgage were executed and received with the intent to defraud creditors, thus giving appellant two chances of recovery ; one based upon a consideration and the other without consideration other than the fraudulent intent as stated. If the objections urged against the instructions came from appellee, a different question would be presented, which would demand serious consideration.

Appellant claimed, and still claims, that he should be granted a new trial upon the grounds of newly-discovered evidence and surprise in the testimony of Messrs. Chambers and Saint, witnesses for appellee. In his affidavit, filed with these reasons for a new trial, he states, substantially, that said witnesses stated upon the trial that they were present when the mortgage was executed, and heard him say that the note and mortgage were given without consideration, and that appellee was about to be sued, and desired to cover up his property ; and that said witnesses assigned, as the principal reason why they could recollect said conversation so well, that they were attorneys for appellee, and were at the time of the conversation detailed, taking a mortgage to themselves to secure fees from appellee ; that he never heard of the attorney-fee mortgage before, and did not make the statements attributed to him by the said witnesses ; that since the trial he has made search for and found the attorney-fee mortgage, and finds that it was made more than a year subsequent to that in suit ; that upon another trial he can contradict said witnesses with said mortgage, and can prove also that at the time the attorney-fee

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mortgage was executed, he and the appellee did not speak to each other.

In some of its statements, this affidavit is in conflict with other portions of the record, and to that extent is overthrown. Neither Chambers nor Saint stated that his recollection of the conversation detailed was in any way based upon the execution of the attorney-fee mortgage mentioned in the affidavit. Saint asked permission to make an explanation in relation to some mortgage subsequent to that in suit, but was not allowed to do so. Chambers stated that at about the time of the execution of the mortgage in suit, there had been mortgages executed to Chambers and Saint, Forkner and Bundy, and one, he thought, to Mr. Brown ("Joe Brown") "for services rendered;" but he does not state that his recollection of the conversation was based upon or fixed by the execution of such mortgage. The so-called attorney-fee mortgage would show that Mr. Chambers was mistaken as to the date of its execution, but it would not in any way contradict the material statements of either Mr. Chambers or Saint. See Works Pr., section 923, and cases cited. It may be stated further, that appellant had the opportunity to and did oppose his testimony to the material statements of these witnesses.

It can not be said, in any legal sense, that appellant was surprised by the statements of these witnesses. It would not be profitable to enter into a discussion in this case of what may constitute surprise in any case, such as will warrant the granting of a new trial. See Works Pr., section 898, *et seq.*, and authorities cited.

Without the assistance of a brief from appellee, we have examined the several questions discussed by appellant's counsel, and find no error in the record for which the judgment should be reversed. The judgment is, therefore, affirmed, at the costs of appellant.

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Ferguson *et al.* v. The State, *ex rel.* Hagans *et al.*

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No. 9012.

## FERGUSON ET AL. v. THE STATE, EX REL. HAGANS ET AL.

**PARTITION.**—*Commissioner to Sell.*—*Distribution of Proceeds.*—*Bond.*—*Complaint.*—*Demand.*—A commissioner appointed, in a suit for partition, to sell lands, is required by statute, R. S. 1881, section 1204, to pay the money realized to the persons entitled, on the order of court, without demand, and a complaint upon his bond for failure need not aver demand.

**SAME.**—*Defects of Complaint Cured after Verdict.*—A complaint on the bond of a commissioner appointed to sell lands in partition, alleging for breach a failure to pay the money realized to the parties entitled, which avers that the money is due and unpaid, is not bad after verdict for failure to allege that the court had made an order for its payment.

**SAME.**—*Interest.*—*Principal and Surety.*—A commissioner selling lands in partition is, by virtue of the statute, R. S. 1881, section 5200, liable for interest from the time when he should have paid the money to those entitled, and so are the sureties on his bond.

**SAME.**—*Evidence.*—*Record.*—*Payments.*—*Receipts.*—In a suit upon the bond of a commissioner to sell lands in partition, a record of the partition cause, showing that the court had set aside reports of the commissioner after they had been approved, and had disallowed credit for certain receipts which had been presented as vouchers, is, *it seems*, proper evidence, and certainly it is harmless where it is otherwise distinctly proved that the payments covered by the receipts had not in fact been made.

**DECEDENTS' ESTATES.**—*Appointment of Administrator.*—The validity of the appointment of an administrator can not be questioned collaterally.

**SAME.**—*Witness.*—*Competency of Party.*—In a suit against the administrator of the principal debtor and his sureties, the plaintiff might testify for himself, under the statute, Acts 1879, p. 245, if the administrator consented. The sureties could not object in such case.

**RECEIPT.**—*Evidence.*—*Payment.*—A receipt is but *prima facie* evidence of payment, and may be contradicted by oral evidence.

From the Clark Circuit Court.

*D. C. Anthony* and *M. C. Hester*, for appellants.

*J. H. Stotsenburg*, for appellees.

**HAMMOND, J.**—This was an action by the State, on the relation of Mahala Hagans, against Samuel M. Perry, administrator of Samuel L. Robinson, deceased, and the appellants. The action was upon a bond executed by Robinson, as principal, and the appellants, as sureties, in a partition action,

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commenced in the common pleas court and afterwards transferred to the circuit court of Clark county. Robinson was appointed commissioner by the court, in that action, to sell real estate, and gave the bond in suit in the penalty of \$4,000, to secure a faithful discharge of his duties. It is averred in the complaint that Robinson, as such commissioner, sold the land, and collected the purchase-money, amounting to \$1,881; that he paid costs and expenses amounting to \$101.25; that twenty-five forty-eighths of the residue should have been paid to the relatrix, according to the finding and judgment of the court, but that no part of the same had been paid to her; and that it was due and unpaid. Prayer for judgment in the sum of \$1,250.

The administrator answered by the general denial. The appellants answered in seven paragraphs. The first was the general denial. The seventh paragraph of their answer was also called a cross complaint against the administrator. The plaintiff and administrator separately demurred to the seventh paragraph. Each demurrer was sustained, and to these rulings the appellants excepted. Reply in denial; trial by the court; finding and judgment for the plaintiff in the sum of \$953; motion by the sureties for a new trial overruled; exceptions; and appeal by them to this court.

Five errors are assigned in this court. The fifth, which will be first considered, is, that the complaint does not state facts sufficient to constitute a cause of action.

It is objected to the complaint, that it does not aver a demand before suit.

The law makes it the duty of the commissioner appointed by the court to sell real estate in an action of partition, after paying costs and expenses, to pay the moneys arising from the sale to the persons entitled thereto, according to their respective shares, under the direction of the court. Section 1204, R. S. 1881. The order of court as to distribution fixes the time of payment. It is then the duty of the com-

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missioner, without demand, to pay the parties their respective shares of money in his hands.

In *Frazee v. McChord*, 1 Ind. 224, this court formulated the following rules respecting a demand.

"1. When the time and place of payment are fixed in the contract, no demand is necessary, before suit:

"2. When the time of payment is fixed and the place is left undetermined by the contract, no demand is necessary.

"3. If the contract be to pay on demand, a special demand before suit is necessary; though on a contract to pay money such demand is not necessary.

"4. When the place of payment is fixed by the contract, but the time is left undetermined, a demand before suit is necessary.

"5. When both the time and place of payment are left undetermined by the contract, a demand before suit is necessary."

See, also, 1 Works Practice, sections 260-263, and authorities cited.

The second rule above is applicable to this case. The time of payment was fixed by the order of court directing distribution.

The case of *Owen v. State*, 25 Ind. 107, strongly supports this view. That, like this, was an action on a bond executed by a commissioner appointed by the court to sell real estate in a partition case. It was said in that case: "The cause of action accrued upon the failure of the commissioner to pay over the money within a reasonable time after he received it, under the direction of the court."

It has been decided by this court that when a ward dies, arrives at lawful age, or, being a female, marries, the guardian's trust expires, and it is then his duty fully to account for and pay over to the proper person all the estate of his ward remaining in his hands. *Stumph v. Pfeiffer*, 58 Ind. 472; *Stroup v. State*, 70 Ind. 495. In such case, suit may be maintained on the guardian's bond, without a demand

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being first made. *Hudson v. State*, 54 Ind. 378; *Baldrige v. State*, 69 Ind. 166; *Higgins v. State*, 87 Ind. 282.

In *Nutzenholster v. State*, 37 Ind. 457, it was held, in an action on a constable's bond for failure to pay over money collected on execution, that it is unnecessary to aver or prove a demand, for the reason that the statute makes it the duty of a constable "to pay over to the proper plaintiff, or to the proper justice, without delay, all money by him collected by virtue of any writ."

We think it may be stated generally as the law, that, when the time for payment is fixed by contract or by law, no demand before suit is necessary.

It is also objected to the complaint that it fails to charge that the court, in the partition action, had made any order directing the commissioner to pay the money to the parties entitled to it. We think the complaint was defective in this respect, and that it should have been held bad on demurrer. But the complaint does aver that the amount sued for was due and unpaid. It could not have been due without an order of court directing distribution. While the averment that the amount is due is a conclusion rather than the statement of a fact, and, therefore, demurrable, we are of the opinion that the defect was cured by the finding. As against an objection coming for the first time in this court, the complaint, thus aided by the finding, should be held sufficient. *Parker v. Clayton*, 72 Ind. 307; *Charlestown School Tp. v. Hay*, 74 Ind. 127; 1 Works Pr., sec. 533.

We will now consider the other errors assigned in the order in which they are numbered. Errors numbered one and two relate to the rulings of the court in sustaining the plaintiff's and the administrator's demurrers to the seventh paragraph of the appellants' answer, also called a cross complaint. Respecting this pleading, we make the following extract from the appellants' brief:

"The seventh paragraph was pleaded both as an answer to the plaintiff's complaint and as a cross complaint against

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Perry. It averred that Robinson died in Clark county, Indiana, in June, 1875, leaving surviving him a widow, Alice V. Robinson, and owning less than five hundred dollars of property; that at the December term, 1875, of the Clark Circuit Court, the said court made an order vesting the said estate entirely in said widow, and ordering that letters of administration on said estate should not be issued; that on the 11th day of September, 1876, the said court, on the application of said Perry, without any notice to said Alice V., and without any order setting aside the said entire investment in the said widow, improvidently granted letters of administration on the said estate to said Perry; that said Perry, before and since said letters were granted him, had been in collusion with said relatrix, aiding her in the prosecution of her said claim against the estate of Robinson as well as against these appellants. Appellants claimed that, by reason of the premises, there was a defect of parties defendants, in this, that the said Alice V. Robinson was not made a party to represent said estate in the stead of Perry, and that the legal representative of said estate was not made a party. This paragraph was duly verified."

We do not think the pleading referred to was good either as an answer, to the plaintiff's complaint or as a cross complaint against the administrator. It certainly stated no fact that would be a bar to the right of the relatrix to recover, nor any cause of action against the administrator. The facts stated did not show that Robinson's widow was either a necessary or a proper party. While the appointment of an administrator, under the facts stated, was irregular and would probably be ground in a direct proceeding for revoking his letters, such appointment was not void. It can not be attacked in a collateral proceeding.

It does not appear from the pleading why the widow, Alice V. Robinson, should be made a party, even if the appointment of the administrator was void, and the estate was in the condition of being without an administrator. It is not shown that she would be in any way liable for the payment of the

debts of her deceased husband; on the contrary, the facts stated show that she would not be liable. No cause of action could have been stated against her; besides, the pleading does not aver that she is living, and without this averment it would be insufficient even if the facts had otherwise shown that she was a necessary party. *Levi v. Haverstick*, 51 Ind. 236. The pleading was insufficient for another reason. The bond in suit was joint, and the law is familiar that where a joint obligor dies, suit may be maintained against the survivors without making the executor or administrator of the deceased obligor a party. At common law he could not be made a party; but under the code of 1852, under which these proceedings were had, the plaintiff might, at his option, in suing, join the administrator or executor with the surviving obligors. *Braxton v. State, ex rel.*, 25 Ind. 82; *Hays v. Crutcher*, 54 Ind. 260.

The present statute has changed this rule. Section 2310, R. S. 1881. The fact that the relatrix elected to make the administrator a party, instead of proceeding only against the appellants as she might have done, neither benefited nor prejudiced the appellants. She might have dismissed as to the administrator, without affecting her right of action against the appellants. Whether the administrator was or was not a party, or whether his appointment was valid, irregular or void, was a matter that did not in the least concern the appellants. As to the alleged collusion between the relatrix and the administrator, it is sufficient to say that no fact is stated that affects the substantial rights of the parties, or that calls for the introduction of a new party. The pleading was manifestly not good for any purpose, and the court correctly sustained the demurrers to it.

In the third error assigned, it is claimed that the court erred in overruling the appellants' motion to suppress the relatrix's deposition. This is no cause for the assignment of an error in this court. Had it been made one of the reasons for a new trial, it would be considered under the alleged error of overruling that motion. But, as it was not embraced in that motion, the question attempted to be raised is not before us.

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The fourth error assigned is that the court erred in overruling the appellants' motion for a new trial.

The first and second reasons for a new trial were that the finding of the court was contrary to law and not sustained by the evidence. The record evidence shows that the commissioner, at the time of his appointment to sell the real estate, on January 12th, 1871, was directed to pay the costs out of the first money received from the sale, and to pay the remainder, as it came into his hands, to the parties according to their respective interests—the twenty-five forty-eighths thereof to be paid to the relatrix. A sale of the land was afterwards reported to, and confirmed by, the court. On January 18th, 1873, the commissioner reported the collection of all the purchase-money, amounting, with interest, to \$1,881. He at the same time reported a partial distribution, showing payment of costs and expenses to the amount of \$101.25, and filing, as vouchers, two receipts executed by the relatrix. The first was for \$259.76, dated February 19th, 1871. The other was for \$326.56, dated November 11th, 1871. On January 5th, 1875, the commissioner filed his final report of distribution, with the relatrix's receipt, without date, for \$341.42. These reports were approved by the court.

In December, 1876, the relatrix filed her motion in the court to set these reports aside as to her, on the ground of fraud, alleging that none of the money covered by her receipts had been paid to her. After various proceedings her motion was granted, in January, 1879. The original parties in the partition case and Robinson's administrator were, but the appellants were not, parties to the proceedings to set aside the report of the commissioner. The evidence of the relatrix, on the trial of the present case, was to the effect that she never received from the commissioner any part of the purchase-money of the land, except the amount for which the first receipt was given. Her evidence also tended to show that she moved with her husband to Kansas about the time of the giving

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of the second receipt, and has resided there since that time, and that the second receipt was given, but no money received on it, just before she removed to that State. The last receipt, as she testifies, was sent to her after her removal by the commissioner, and was signed and returned by her to him. No money, as she testifies, was ever received by her on this receipt. Her evidence, in some particulars, was not very clear, and there were unimportant discrepancies in it; but we think the trial court might have found from it the facts as above stated. The law is too well established to call for a citation of authorities that a receipt is only *prima facie* evidence of payment, and may be explained or contradicted by oral proof.

We think that the finding of the court was sustained by the evidence, and that it was not, therefore, contrary to law.

The third reason for a new trial was because of error in assessing too large an amount in favor of the plaintiff. The only question on this point is whether the relatrix was entitled to interest. "On money had and received for the use of another, and retained without his consent, interest shall be allowed at the rate of six dollars a year on one hundred dollars." Section 5200, R. S. 1881. We think it was clearly inferable from the evidence, that the relatrix was kept out of her money nearly eight years without her consent, and was put to vexatious litigation, attended necessarily with expense, resulting from the dishonesty of the commissioner. Her only security was the bond voluntarily executed by the appellants. While they had no participation in the fraud of their principal, and it is a hardship for them to suffer for his defalcation, it is a hardship imposed by law growing out of an obligation that placed it in his power to perpetrate the wrong complained of. Interest at six per cent. from the time of the receipt of the money by the commissioner to the date of the trial, added to the principal sum due the relatrix, makes an amount larger than that found by the court. We think the damages assessed were not excessive.

The fourth reason for a new trial was the admission in evidence of the deposition of the relatrix. This was objected

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to by the appellants on the ground that an administrator was a party defendant. The law in force on this subject at the time of the trial was as follows: "In all suits where an \* \* \* administrator \* \* \* is a party, in a case where a judgment may be rendered either for or against an estate represented by such \* \* \* administrator, \* \* \* neither party shall be allowed to testify as a witness, unless required by the opposite party or the court trying the cause." Acts 1879, p. 245.

The record shows that the administrator consented to the admission of the evidence complained of. We think he could do this. The statute was enacted in the interest of the estates of deceased persons. Their personal representatives may waive its provisions, and not only require but consent to the opposite party to testify. It is possible that for an abuse of this discretion they would be liable to creditors or other distributees of the estate injured by such evidence; others, however, may not complain. Had the relatrix elected, as she might, to sue the appellants without joining the administrator, her right to testify could not be questioned. As the administrator consented, there is no reason why she should be deprived of the benefit of her own evidence because of an election to make him a party, which election, as already stated, could neither benefit nor prejudice the appellants. Under the circumstances, we think there was no error in receiving her testimony.

The fifth and last reason for a new trial was, that the court erred in admitting in evidence the record of the proceedings of the relatrix which resulted in setting aside the reports of the commissioner and the court's approvals thereof, as to payments alleged to have been made to her. We think that the admission of this record was harmless. The law requires executors, administrators and guardians to make final settlements. These, when approved by the court, are conclusive until set aside. Sections 2402-3, R. S. 1881; *Pate v. Moore*, 79 Ind. 20; *State v. Slauter*, 80 Ind. 597. But there is no law requiring such reports from commissioners appointed to sell real estate. Such reports are proper and may no doubt

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be required by the court; but while filed, as in the case in which the commissioner was appointed, if, as in the present case, they are filed and acted upon by the court without notice to the parties interested, they are simply *ex parte*, and afford nothing more than *prima facie* evidence. They do not, in such case, without being set aside, bar an action on the commissioner's bond. Where a fraud is practiced upon the court by a false report, bolstered up by sham vouchers, it is a duty which the court owes to itself, when the matter is properly brought to its notice, to purge its records of the fraud. Notice in such case to the commissioner, or if he is dead to his personal representative, is sufficient. While the introduction in evidence of the record complained of was not necessary to maintain the relatrix's suit, it was proper, or, at any rate, did no harm.

We have carefully examined every available objection to the proceedings of the trial court, and can find no error.

Judgment affirmed, at appellants' costs.

Howe, J., did not participate in this decision.

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No. 10,767.

EMERICK, ADMINISTRATOR, v. CHESROWN.

STATUTE OF LIMITATIONS.—*Demand*.—Where one receives money of another to be paid upon the debt of the latter, and fails to so pay, the statute of limitations does not begin to run against the latter until demand is made.

From the Noble Circuit Court.

A. A. Chapin and R. P. Barr, for appellant.

V. C. Mains, for appellee.

BICKNELL, C. C.—This was a claim by the appellee against a decedent's estate. The claim alleged that in 1867 the appellee delivered to the decedent, then in life, who was the father-in-law of the appellee, \$200, to be paid by him to the

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appellee's creditors, and to be accounted for on demand; that the decedent paid to said creditors \$145 of said money, and kept the remaining \$55, and died in May, 1878, without having accounted therefor. The claim demanded \$55 and interest, and alleged that the appellant, the decedent's administrator, had refused to pay it on demand.

The administrator answered in four paragraphs, to wit:

1. The general denial.

2. Payment.

3. That the cause of action did not accrue within six years before the decedent's death.

4. A set-off.

There was no reply, but, the cause having been submitted to the court for trial, a reply was waived; the answer was regarded as denied. *Dodds v. Vannoy*, 61 Ind. 89.

The court found for the claimant \$55, the defendant's motion for a new trial was overruled, judgment was rendered on the finding. The defendant appealed.

The error assigned is overruling the motion for a new trial. The reasons for a new trial are:

1. The finding is not sustained by sufficient evidence.

2. The finding is contrary to law.

3. The finding is contrary to the evidence.

4. Error of the court in recalling Mason M. Bowen as a witness after the parties had rested, and in permitting him then to testify.

5. Error in admitting as evidence the docket entry of a judgment in favor of Mason M. Bowen against William Jordan and others, over defendant's objection.

6. Error in admitting in evidence the pretended assignment of said judgment, over defendant's objection.

In support of the first three specifications of error, the appellant contends that the claim was barred by the statute of limitations. But the evidence shows that the money was received by the decedent to be applied in payment of the appellee's debts, and that all of it was so applied except \$55,

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and that the defendant died in 1878, without having rendered an account.

When the defendant died the statute of limitations had not begun to run. It does not begin to run in such case until demand made—and the bringing of the suit is a sufficient demand. *Dodds v. Vannoy*, *supra*; *Trimble v. Pollock*, 77 Ind. 576; *Wright v. Jordan*, 71 Ind. 1.

Section 298, R. S. 1881, which is the same as section 217 of the civil code of 1852, is as follows: "If any person entitled to bring, or liable to any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought at any time after the expiration of the time limited, within eighteen months after the death of such person." This section applies only to cases where the party dies after the statute has begun to run and before the time limited has expired, and in such cases its effect is to extend the time of limitation. This was the construction given to the section under consideration in *Harris v. Rice*, 66 Ind. 267, where it was said by HOWK, J.: "Thus, it seems to us, that, under this section, while the ordinary period of limitation may possibly be enlarged, yet it can never be diminished or abbreviated in any case." To the same effect are the cases of *Hiatt v. Hough*, 11 Ind. 161, and *Knippenberg v. Morris*, 80 Ind. 540. The claim in this case was not barred by the statute of limitations, and the finding was sustained by the evidence, and was not contrary to law.

As to the fourth specification of error, it was in the discretion of the court to recall the witness, Bowen, and re-examine him after the parties had rested, and in such cases this court will not interfere, unless there has been an abuse of such discretion. *Coats v. Gregory*, 10 Ind. 345; *Watt v. Alword*, 25 Ind. 533; *Sharp v. Radebaugh*, 70 Ind. 547.

As to the fifth and sixth specifications of error, the record mentioned in the fifth specification, and the assignment

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thereof, mentioned in the sixth specification, were altogether immaterial; the examination of them by the court, of its own motion, after the parties had rested, was, at most, a harmless error, which will not warrant the reversal of the judgment. *McDermitt v. Hubanks*, 25 Ind. 232; *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 66; *Pettis v. Johnson*, 56 Ind. 139; *Lovinger v. First National Bank of Madison*, 81 Ind. 354.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed at the costs of the appellant.

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No. 10,699.

LEFFEL ET AL. v. OBENCHAIN ET AL.

**HIGHWAY.**—*Location of.*—*Remonstrants.*—*Separate Appeals.*—*Bond.*—*Surety.*

—Where a proposed highway affects the respective lands of several persons, and each of them files before the board of commissioners his separate remonstrance on the ground that such road will not be of public utility, and that he will sustain damages by its location, each may appeal from the order made against him by filing bond, with his co-remonstrator as his surety.

**SAME.**—*Dismissal.*—*Sufficient Bond.*—After the consolidation of such cases in the circuit court, such appeal will not be dismissed because none of the bonds filed are signed by any person other than one of the other remonstrators for damages.

**COSTS.**—*Bill of Exceptions.*—*Supreme Court.*—The ruling upon a motion to tax costs must be preserved by a bill of exceptions, in order to present any question upon such ruling in the Supreme Court.

From the Cass Circuit Court.

*F. Swigart, M. Winfield and Q. A. Myers*, for appellants.

*J. C. Nelson and D. B. McConnell*, for appellees.

BEST, C.—The appellant filed a petition before the board of commissioners of Cass county for the location of a highway. Viewers were appointed, who reported in favor of its

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public utility, after which nine persons, each of whom owned land through which the road runs, filed separate remonstrances on the ground that the highway would not be of public utility, and that each would sustain damages by its location. Reviewers were thereupon appointed, who reported in favor of the public utility of the road, and assessed damages in favor of each remonstrator. Each then appealed to the circuit court by filing his bond, with one of the other remonstrators as his surety. Separate transcripts were made and separate cases docketed in the circuit court. These were ordered consolidated, after which the appellants moved to dismiss the appeal on the ground that an appeal bond had not been executed with surety as required by statute. This motion was overruled, the cause tried, the road adjudged to be of public utility, and a larger amount of damages assessed to each remonstrator, after which the record recites that an unavailing motion was made by the appellants to tax costs.

The refusal of the court to dismiss the appeal and to tax costs are assigned as error.

The motion to dismiss the appeal proceeds upon the assumption that there can be but one appeal in these proceedings, to which all appellants must be parties, and as no other person signed any bond in this case, as a surety, there is, therefore, no surety upon the appeal bond, as required by statute. In support of this position appellants rely upon the cases of *McVey v. Heavenridge*, 30 Ind. 100, and *Scotten v. Divelbiss*, 46 Ind. 301. Neither of these cases supports them. In *McVey v. Heavenridge, supra*, it does not appear that the land affected by the location of the highway was not jointly owned by the appellants. It does appear that they filed a petition asking for the assessment of damages, and after this was refused they joined in an appeal bond without a surety. For this reason the appeal was dismissed. If they owned the land jointly or as tenants in common, they were required to unite in a remonstrance, and, in order to appeal, to execute a bond, with some other person as surety.

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In *Scotten v. Divelbiss*, *supra*, the appellants remonstrated. For what cause does not appear; presumably, because the highway would not be of public utility. They appealed without surety and without the auditor's approval of their bond, and for these reasons the appeal was dismissed. If they united in a remonstrance they could not appeal without giving bond with surety as required by statute, and hence the appeal was properly dismissed.

Neither of these cases holds or intimates that a person whose lands are affected by the location of a highway, and who has remonstrated, asking damages, may not himself appeal, without uniting with others who may have remonstrated in such proceeding either because the road is not of public utility, or because he has been damaged by locating such highway through his lands. In such case we know of no reason why any person who has filed his remonstrance because of damages sustained by him may not appeal, and if more than one person have filed separate remonstrances, for such cause, we know of no reason why each may not appeal from the order made upon their respective remonstrances. In this way only can they assert their respective rights. The appeal of one does not vacate the order made in relation to another, but in order to do so the person affected by the order must appeal. If A. is allowed \$100 damages, and B. appeals from the order made for or against him, such appeal will not vacate the order in favor of A. The order in favor of each is in the nature of a judgment, and can only be vacated by an appeal taken by the person in whose favor it is made, or by the opposite party. In this respect these proceedings are very analogous to attachment proceedings, where creditors file their claims under the original proceeding. For some purposes such proceedings constitute but one suit; while for other purposes they constitute separate suits. *Henderson v. Bliss*, 8 Ind. 100.

So proceedings to establish a highway, when several remonstrators file separate remonstrances for the damages sustained by each of them, constitute a single suit for some pur-

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poses; while for others they constitute separate suits. An issue formed by A. as to his damages affects him and the petitioners alone. No other remonstrator is interested in it, and no appeal from an order awarding or refusing another remonstrator damages can affect it. This must, in the very nature of things, be so when the remonstrance is for damages alone. The remonstrances in this case were not for damages alone, but for damages and for want of public utility. Both causes may be embraced in the same remonstrance. *Butterworth v. Bartlett*, 50 Ind. 537; *Peed v. Brenneman*, 72 Ind. 288. The union of these two causes in the remonstrances does not, in our opinion, change the character of the issue as to damages. This can not affect any one except the remonstrator and the petitioners, and it, therefore, tenders a separate issue. The trial of such issue may affect an award made to some other remonstrator for damages, but it will not necessarily do so. If, upon the trial of such issue in the circuit court, the road is found not to be of public utility, the judgment would probably annul every allowance for damages, whether an appeal had been taken from such allowances or not, but if found to be of public utility, allowances unappealed from would be unaffected, and, hence, such remonstrance must be regarded as tendering a separate issue. If separate, a party who is dissatisfied with his allowance must appeal in order to have the question re-tried in the circuit court. For these reasons, we think each remonstrator could appeal from his allowance, and that his bond was not bad simply because signed by some other remonstrator as surety.

Neither the motion to tax costs nor the ruling of the court thereon is preserved by a bill of exceptions, and hence the record presents no question in relation thereto.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellants' costs.

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 Roy *et al.* v. Rowe.
 

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No. 9997.

## ROY ET AL. v. ROWE.

JURISDICTION.—*Service of Process.*—*Judgment.*—*Practice.*—*Guardian ad Litem.*

—Where infant defendants are not served with process and do not appear, the court has no authority to appoint a guardian *ad litem* for them, and no jurisdiction as to them, and, on appeal, when the judgment against them affects also the other appellants, it will be reversed as to all.

WILL.—*Construction.*—*Widow.*—A will directed the sale of the testator's real and personal estate, and gave to the testator's widow "all that remains of the estate after paying the debts, \* \* for her support and that of the minor children," and made her guardian of the children during her life. There was no other provision made for children, and no residuary clause. The wife was a helpless invalid, and the estate was, after paying debts, a tract of land worth \$450 when the testator died.

*Held*, that under the will, interpreted in the light of the circumstances, the widow took the land in fee simple.

From the LaGrange Circuit Court.

A. A. Chapin, R. P. Barr and O. L. Ballou, for appellants.

BLACK, C.—The appellee, Maria E. Rowe, sued the appellants George Roy, Cyrus Finlay, Elora M. Finlay, Anna B. Fought, Sarah A. Fought, Wilber E. Wise and Hinda M. Wise, for the partition of certain land situated in LaGrange county. The defendants George Roy, Cyrus Finlay and Elora M. Finlay having jointly and severally demurred to the amended complaint, for want of sufficient facts, and the demurrer having been overruled, these defendants answered jointly by a general denial, and Cyrus Finlay answered separately in a number of paragraphs, to one of which a demurrer of the plaintiff was sustained. To the others the plaintiff replied in denial.

The defendants Wise and Wise filed an answer and a cross complaint asking partition; and the plaintiff filed a "reply to the answer and cross complaint" of Wise and Wise. The infancy of the defendants Fought and Fought having been suggested, the court appointed a guardian *ad litem* for them, and he, as such guardian, answered the original complaint.

90	54
126	536

90	54
126	446

90	54
135	370

90	54
143	274
143	374

90	54
145	137
146	480

90	54
152	493

90	54
158	74

90	54
161	536

90	54
171	365

90	54
171	365

90	54
171	365

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His answer does not appear to have been refiled, and he does not appear to have pleaded further after the complaint was amended, though the plaintiff, long after the filing of the amended complaint, filed a reply to the answer of the guardian *ad litem*.

The cause was tried by the court, and there was a special finding. The defendants George Roy and Cyrus Finlay excepted to the conclusions of law. The court ordered that partition be made, giving to the plaintiff one-fourth of said land, to the defendant Cyrus Finlay one-half thereof, and to each of the defendants Wise and Wise and Fought and Fought one-sixteenth thereof. Commissioners were appointed, who reported, and partition was finally adjudged.

The defendants George Roy and Cyrus Finlay appealed, and served notice of the appeal upon their co-defendants, and have filed proof of such notice with the clerk of this court. Said co-defendants have not appeared, and declined to join, and they are, therefore, regarded as having joined in the appeal. Section 635, R. S. 1881.

Elora M. Finlay is not shown by the complaint to have an interest in the land, or to have asserted a claim to an interest therein, and no reason whatever for making her a party appears in the record. But there was no finding or judgment either against her or in her favor.

The record does not show any service of process upon the infant defendants, or that they personally appeared. The court had not jurisdiction of their persons, and was not authorized, therefore, to appoint a guardian *ad litem* for them, and a guardian *ad litem* appointed for them could not represent them. The want of service of process upon the infant defendants is assigned as error; and these defendants being affected by the judgment in common with the other parties, and as to a subject-matter in which the interest of every party is affected and determined by the interest of the other parties, we can not sustain the judgment in part, but will be required, for this want of jurisdiction, to reverse it as to all the parties. *Abdil*

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v. *Abdil*, 26 Ind. 287; *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Carver v. Carver*, 64 Ind. 194.

We think there was also error in the action of the court, involving the merits of the controversy between the parties—that it erred in overruling the demurrer to the complaint, and that the conclusions of law upon the facts found were erroneous.

We will state such of the facts as are necessary to the decision of the question involved.

John B. Davis died testate, in 1856, in LaGrange county, seized in fee simple of certain lands in said county, of which the land in dispute is a part, leaving surviving his widow, Sarah E. Davis, and nine children, six sons and three daughters, issue of his marriage with her. The plaintiff was one of said daughters. Triphena Wise, another of said daughters, died before the commencement of this suit, leaving surviving the defendants Wise and Wise, her children and only heirs. Sarah Fought, another of said daughters, also died before the commencement of this suit, leaving surviving the defendants Fought and Fought, her children, who are minors, and her husband, not made a party, who, after the commencement of the action, it is said in the special finding, quitclaimed to said defendants Fought and Fought all his interest in said land.

The will of said John B. Davis, deceased, was duly probated in 1856, and contained the following provisions:

“1st. First, it is my wish and desire that my personal property, not taken by the widow, shall be sold toward paying my debts.

“2d. It is my will and desire that my real estate be sold, at private or public sale, as may be thought most advisable for the interest of the estate.

“3d. I give and bequeath unto my beloved wife, Sarah Davis, all that remains of the estate after paying the debts, and the estate is settled, for the purpose of her support and that of the minor children; and I hereby commit the guardianship of all of my children, until they shall respectively attain the

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age of twenty-one years, unto my said wife, during her life; and I do hereby appoint my trusty friend, N. O. Osborn, sole executor of this my last will and testament. In witness whereof," etc.

After the death of the testator all the land of which he died seized, except that described in the complaint, with all his personal property, except goods of the value of \$118.19 taken by the widow, was sold, it is not stated by whom, to pay the testator's debts.

On the 15th of January, 1867, the widow and three of the sons, by their warranty deed, conveyed the land in dispute, for twelve hundred dollars, which was then its value, to one Rosalie Finlay. Before the execution of said deed two of the sons had died without issue. After the execution of said deed the surviving son, who had not joined in it, conveyed his interest in the land to the plaintiff, and afterward, in 1867, died without issue.

The widow took under the will, and from the death of the testator until she executed said deed to said Rosalie Finlay claimed to be the absolute owner in fee simple of all said land, by virtue of said will.

In 1878, said Rosalie Finlay and her husband sold, and by their warranty deed conveyed, the land to the defendant George Roy, for \$1,400, then its value; and said George Roy, in 1880, sold, and by his warranty deed conveyed, the land to the defendant Cyrus Finlay, who paid in consideration therefor \$2,000. Said Rosalie Finlay and her said grantee, Roy, and his grantee, Cyrus Finlay, severally went into possession of the land in dispute, under and by virtue of their several deeds, at the times of the execution thereof severally, and each claimed to be the absolute owner in fee simple by virtue of his or her said deed, and the defendant Cyrus Finlay still remains in possession, claiming the land as his own in fee simple by virtue of his said deed; and each of said grantees while so in possession made lasting and valuable improvements. The land was worth \$450 at the

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time of the testator's death, and at that time his widow was disabled and crippled by paralysis, and was unable to labor and make her own living. She died in 1873.

The action of the court below was based upon the theory that the widow took under the will only a life-estate in the land, and that the testator's surviving children took the land by descent from their father, subject to said life-estate of the widow. If, under the will, the widow became the owner of the land in fee simple, the appellant Cyrus Finlay is the owner thereof in severalty, and there can be no partition thereof.

The intention of the testator must be followed, so far as it is not in contravention of law and can be ascertained. The construction of any provision of the will may be aided by other portions of the will, and by the whole will and the general purpose indicated therein; and the meaning of the terms of the will may be explained by such extrinsic evidence as will enable the court to see from the testator's standpoint.

The old rule that a general devise of real estate, merely describing the property, without defining the interest to be taken by the devisee, gives only an estate for life, which was abolished in England by 1 Vic. Ch. 26, and which has been abolished in many of our States, is in force in this State, though it was abolished here from 1843 to 1853. See R. S. 1843, p. 485, section 5; *Cleveland v. Spilman*, 25 Ind. 95; *Smith v. Meiser*, 51 Ind. 419.

This rule often operates in contradiction of the rule that the testator's intention shall prevail, especially in the case of wills made by persons unskilled in the law; for the common mind will usually suppose that a general devise, without limitation, carries the whole estate of the testator.

Therefore, if the will contain any expression, in addition to the general devise, indicating an intention to pass a fee simple, the court will use this to bear out the intention; though it must in some way affirmatively appear, courts are easily satisfied that an estate of inheritance was intended. *Cleveland*

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v. *Spilman*, *supra*. They are always ready to adopt any plausible excuse for rescuing particular cases from the wrong direction which the general rule would give them. 2 Redf. Wills, 327.

It is insisted on behalf of the appellants that the second clause of the will was an absolute and unconditional direction for the sale of the realty, and that the last clause disposed of the proceeds thereof; that it was the intention of the testator that the land should be converted into money and that the money should go to the widow; and it is insisted that the sale, if not made by the executor, might be made by the widow; and that if the land were not sold as directed the widow had a vested interest in it in specie, in lieu of the proceeds.

Whether the testator intended that all his real estate should be sold, or only such portion as it might be deemed best to sell, and as it might be necessary to sell for the payment of his debts, he plainly directed that all that might remain of his estate, after paying the debts and after the settlement of his estate, should go to his widow, and this would include land as well as personalty. The word "estate" covered both the subject-matter and the testator's whole interest therein.

It is evident that the will was drawn by an unskilful person, and it must not be treated as drawn with a view to technical rules of law which contravene common understanding.

The term of endearment used by the testator in providing for his wife, the smallness of his estate after the payment of his debts, the diseased and enfeebled condition of his wife, the fact that he left to her care minor children, the fact that he made no provision for any of his children except the maintenance and guardianship of the minors by their mother, in whom he vested his property, in part for the purpose of the support of the minor children, all occur to the mind as reasons in support of a construction contrary to that adopted by the court below. *McMahan v. Newcomer*, 82 Ind. 565.

A construction which will result in partial intestacy is to be avoided, unless the language of the will compels it. *Cate*

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v. *Granor*, 30 Ind. 292. Not only did the making of the will indicate an intention to dispose of all the testator's property, but he also expressly made disposition of all his goods and lands; and the fact that he made no provision for any portion thereof to go beyond his widow, indicates strongly his intention that his whole interest therein should abide with her.

We have no brief from the appellee, but we are told by counsel for the appellants that the court carried back the words "during her life," in the third clause, so as to make them qualify the interest given to the widow. No reasonable construction can apply those words except to the period of guardianship, though it is true that they are superfluous for such purpose; nor is it necessary to suppose, or in this case proper to suppose, that the word "guardianship" had reference to any estate of said minors derived under said will.

We conclude that the widow was competent to transfer title in fee simple to all the land in dispute, and that, therefore, under the facts stated in the complaint, the appellant Cyrus Finlay would be the owner of the land in severalty.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

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No. 10,285.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY  
COMPANY v. ADAMSON.

NEGLIGENCE.—*Railroads.—Injuries from Fire.—Complaint.*—A complaint against a railroad company for the destruction of property caused by a fire kindled by its negligence on its right of way, which spread to other lands where the property was located, which fails to aver that the company negligently suffered the fire to so spread, is bad on demurrer.

From the Warren Circuit Court.

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The Indiana, Bloomington and Western R. W. Co. v. Adamson.

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*C. W. Fairbanks*, for appellant.

*C. V. McAdams, J. M. Rhbb* and *J. B. Martin*, for appellee.

MORRIS, C.—The appellee sued the appellant for damages claimed to have been occasioned by the unlawful destruction of the property of the appellee by the appellant. The complaint contained two paragraphs. A demurrer was sustained to the second and overruled to the first.

It is alleged, in the first paragraph of the complaint, that the appellant owns and operates a railroad, extending from Indianapolis, Indiana, to Bloomington, Illinois; that in the month of August, 1881, the appellee had stacked, with her consent, on the premises of Nancy Adamson, in Warren county, Indiana, adjoining the appellant's right of way, ninety bushels of wheat in the straw, of the value of \$95; that the appellant, during the time the appellee's wheat was so stacked as aforesaid, negligently permitted dry grass, leaves and other combustible rubbish to gather upon its right of way adjoining the premises whereon the plaintiff's wheat was so stacked, and that through the fault and negligence of the appellant and its servants, in permitting such combustible rubbish to gather upon its right of way as aforesaid, and in failing to provide its locomotives, propelled by steam, with proper spark arresters, said rubbish was, during said month, set on fire by sparks escaping from the appellant's locomotives, and that said fire was started through the fault and negligence of the appellant as aforesaid, and, without fault on the part of the appellee, escaped from the premises of the appellant and set fire to and destroyed the appellee's wheat, to his damage \$100.

The appellant, after its demurrer had been overruled, answered by a general denial. The cause was submitted to the court for trial. There was a finding for the appellee, upon which, over a motion for a new trial, judgment was rendered. The ruling of the court upon the demurrer to the first paragraph of the complaint is assigned as error.

The charge in the complaint is that the appellant negligently

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set fire to dry grass, leaves and combustible matter, carelessly and negligently allowed to accumulate upon its right of way adjoining the premises on which the appellee's wheat was stacked; that the fire thus negligently started by the appellant, through said combustible matter, communicated to and destroyed the appellee's wheat. It is alleged that the appellant failed to provide for its locomotives proper spark arresters, and that said rubbish was set on fire by sparks escaping from said locomotive. This statement shows, and only shows, what is elsewhere directly averred in the complaint, that the rubbish was negligently set on fire by the appellant. It is clear that there is no averment in the complaint that the appellant negligently suffered the fire to escape from its right of way to the property of the appellee. Such an averment, according to the decisions in this State, is necessary. *Pittsburgh, etc., R. W. Co. v. Culver*, 60 Ind. 469; *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. W. Co. v. Ehlert*, 87 Ind. 339. In the latter case, upon a petition for a rehearing, ELLIOTT, J., says: "The authorities are unusually harmonious in holding that the complaint must do more than show that the defendant, in such a case as this, negligently set fire to his own property; it must also show that he negligently caused or suffered the fire to be communicated to the property of the plaintiff."

In the case of *Louisville, etc., R. W. Co. v. Krimming*, 87 Ind. 351, it is not only averred in the complaint that the defendant negligently set fire to dry grass on its right of way, but "carelessly and negligently suffered, allowed and permitted the said fire to spread from its right of way to adjoining lands, and thence to the lands of appellee." This was sufficient, and there is nothing in the case inconsistent with the other cases upon the subject. There is no such averment in the complaint before us.

And in the case of *Louisville, etc., R. W. Co. v. Hanmann*, 87 Ind. 422, it is averred in the complaint, that "the appellant,

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by its agents and servants, so negligently conducted the running of one of its engines that said engine fired said grass, weeds, etc., along its track and upon its right of way, and that *said engine fired the grass and other combustible material grown and accumulated upon the lands in the vicinity of, adjoining, and lying between the railroad and appellant's land,"* etc. These allegations distinguish this from the cases holding that an averment of negligence in suffering the fire to communicate to the property of the plaintiff is necessary. The fire in the case above referred to is alleged to have been communicated directly from the engine to the adjoining lands, etc.

We think the court erred in overruling the demurrer to the first paragraph of the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

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No. 9888.

DUNNING ET AL. v. SEWARD.

SUBROGATION.—*Judgment.*—*Partition.*—*Sheriff's Sale.*—*Costs.*—*Res Adjudicata.*—A decree was obtained making real estate conveyed by an ancestor subject to the payment of certain judgments against him; on the same day a partition of the same lands was had between the widow and heirs of the judgment debtor, and it was agreed by all the parties that the proceeds of such sale (not including one-third reserved for the widow) be applied first, \$281 to the widow, to make up balance of her \$500 under the statute, and next to the payment of the judgments. A commissioner made sale, but the court refused to enforce the agreement by applying the purchase-money on the judgments. Thereupon the lands were sold by the sheriff to satisfy the judgments, and the purchaser at the partition sale was compelled to purchase for his protection.

*Held*, that the purchaser had a right to be reimbursed for the amount paid upon his purchase from the sheriff out of the proceeds of the partition sale.

*Held*, also, that, in a suit by the purchaser against the widow and infant heirs to obtain such subrogation, they having made defence, it was not error to render judgment for costs against them.

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*Held*, also, that an answer in such case, averring a former decision against the plaintiff, on a motion for the same relief in the partition case, and disclosing that there is no record of the decision, is bad on demurrer.

From the Switzerland Circuit Court.

*W. D. Ward* and *T. Livings*, for appellants.

*J. D. Works* and *J. A. Works*, for appellee.

FRANKLIN, C.—This was a suit by appellee against appellants to set aside a certain sale of real estate made by a commissioner in partition proceedings, or to subject appellants' interest in the proceeds of the sale to the payment of a judgment lien existing at and before the date of sale.

The complaint alleges that on the 23d day of March, 1875, the National Bank of Rising Sun, Indiana, recovered two judgments in the Switzerland Circuit Court, one for \$238, and the other for \$1,064.23, with costs of both suits, against Mortimer Dunning and others; that on the 25th day of March, 1875, Mortimer Dunning died, leaving appellants Frances Dunning, his widow, and Aldridge, Josiah and Mortimer, his children; that on the 30th day of December, 1873, said deceased owned real estate in Ohio county and said Switzerland county, in said State; that on said day he conveyed said real estate to said Aldridge and Josiah Dunning, his wife not joining in said conveyance; that on the 25th day of October, 1875, transcripts of said judgments were filed in the clerk's office of said Ohio Circuit Court, and were duly recorded in the judgment docket thereof; that afterwards, by a proceeding had in the said Switzerland Circuit Court, on the 19th day of January, 1878, said judgments were revived, and the deed made by said deceased to said appellants was declared void and set aside as fraudulent against creditors, and the land was decreed subject to, and ordered to be sold for the payment of, said judgments, which then amounted to \$1,671.24, and the costs amounted to \$300; that on the 7th day of March, 1877, the widow, said Frances Dunning, brought her suit in the same court for the partition

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of said lands; that both suits were pending in said court at the same time, and that said judgments were liens upon eleven-fifteenths of said real estate; that the said Frances was the administratrix of the estate of said deceased, and that his personal estate only amounted to \$219, which was taken by the widow, and that he was not at the time of his death the owner or possessed of any other estate, real or personal; that at the time of the trial of said suit to set aside said deed and subject the interest of the heirs to the payment of said judgments, it was agreed between said national bank and said Frances, with the knowledge and consent of the other defendants, Aldridge, Josiah and Mortimer Dunning, that if the said national bank would allow the defendant Frances the sum of \$281, to make up her \$500, as widow, out of that part of said real estate, subject to the payment of said judgments, a judgment might go in favor of said bank, setting aside said deed as fraudulent, and ordering the sale of the undivided eleven-fifteenths of said real estate to satisfy said judgments, and that judgment might go in the partition suit, and that sale should be made of the said real estate under the partition proceedings, and that the said national bank should become the purchaser and pay to the said Frances her share of the purchase-money and the said sum of \$281 in addition, and that the balance of said purchase-money should, when paid into court, be applied to the satisfaction of said judgments, and the judgments in both cases were so entered up in pursuance of said agreement, and that the defendant Solomon K. Kittle was appointed in pursuance thereof, to make the sale of said real estate, and that he was fully informed of said agreement and arrangement as to the proceeds of said sale, and fully understood the same; that the plaintiff herein was then president of said bank, and was fully informed of and understood said agreement; that said commissioner, after having given due notice, on the 29th day of July, 1878, sold said real estate; that the plaintiff, acting

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*Dunning et al. v. Seward.*

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for said bank, purchased said real estate for said bank, for the sum of \$2,065, which was the full value of said real estate, that he paid to said commissioner the first instalment thereof, \$688.33; that after said purchase it was agreed between him and the bank that he should take said real estate and pay the purchase-money himself, the judgments to be paid out of the purchase-money, and said commissioner reported the plaintiff as the purchaser, and he paid the first instalment of the purchase-money into court for distribution; that the court refused to recognize the agreement so made, and ordered that the whole of said instalment so paid into court to be paid to the parties in said partition proceedings, leaving said real estate in the hands of this plaintiff subject to the payment of said bank judgments, which amounted at the time to over \$2,000; that since said time said bank has caused executions to issue on said judgments, and has forced the sale of the undivided eleven-fifteenths of said real estate, and the plaintiff was compelled to buy the same in and pay therefor the sum of \$1,260, or lose all that he had paid on the sale under the partition proceedings; that after he so purchased under the partition proceedings, and before he learned that no part of the purchase-money would be applied on the payment of said judgments, he made lasting and valuable improvements on said real estate, amounting in value to \$500; that if he had not been informed of the arrangement made, as above set forth, for the application of the purchase-money, and had not believed the same would be carried out, he would not have purchased said real estate; that the defendants are wholly insolvent, and he can not recover back the money which he has paid. Prayer that the commissioner's sale be set aside, or that the interest of the heirs in the undistributed purchase-money be applied to reimburse him for the money so paid out on said bank judgments, and for general relief.

To this complaint the defendants filed separate demurrers, which were overruled. They then filed a joint general de-

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nial and separate special answers, the minors Josiah and Mortimer Dunning appearing by a guardian *ad litem*.

A demurrer was sustained to the third paragraph of the guardian *ad litem*'s answer.

Issues were formed and there was a trial by the court. At the request of the defendants, the court specially found the facts and stated its conclusions of law. The findings are full and specific, and are too long to copy in this opinion.

The conclusions of law are as follows:

"1st. That the agreement made that the purchase-money under the partition proceedings should be applied to the payment of the bank judgments, was not binding on the defendants Aldridge Dunning, Josiah Dunning and Mortimer Dunning.

"2d. That the judgments of the bank were liens on the real estate described in the complaint at the time plaintiff purchased at the partition sale.

"3d. That the plaintiff is entitled to be subrogated to the rights of the said national bank of Rising Sun, Indiana, and to have the shares of the defendants Aldridge Dunning, Josiah Dunning and Mortimer Dunning of the purchase-money yet due from the plaintiff applied to the payment of the amount paid by him on said judgments through the sheriff's sale."

The defendants Aldridge, Josiah and Mortimer, by their guardian *ad litem*, excepted to the conclusions of law, and judgment was rendered for the plaintiff.

The defendant Frances moved to modify the judgment so as not to render it against her for any costs except those made by her. The guardian *ad litem* moved the court to so modify the judgment that there should be no judgment against the minors for costs; both of which motions were overruled by the court.

The errors assigned on behalf of Frances are:

1st. Overruling the demurrer to the complaint.

2d. Overruling the motion to modify the judgment as to costs.

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The errors assigned by the guardian *ad litem*, on behalf of the minors, are :

1st. Overruling the demurrer to the complaint.

2d. Sustaining the demurrer to the third paragraph of their answer.

3d. In the conclusions of law on the special findings.

4th. In rendering judgment against them for costs.

The first objection to the complaint is that it does not state facts sufficient to show that the judgments ever became liens upon the Ohio county lands; that Mortimer Dunning, Sr., had been dead some months before the transcripts of the judgments were filed and recorded in the clerk's office of said county; that the title to the lands had before that time passed to the heirs, and no lien could attach by the subsequent filing of the transcript. And in support thereof we are referred to the case of *Hankins v. Kimball*, 57 Ind. 42. It is true, as is held in that case and some other cases, that upon the death of the ancestor the title to his realty passes to his heirs where there is no will; and when they are present, as against the administrator, they have a right to possession, but their ownership is subject to the debts of the ancestor, and the administrator can sell the realty for the payment of such debts. Whether the filing of the transcripts created a lien upon the lands in Ohio county, we think immaterial, for the reason that the decree of the court in the proceedings setting aside the deed as fraudulent, reviving the judgments, declaring the lands subject to the payment of the judgments, and ordering them sold for that purpose, created a specific lien and an encumbrance upon the lands in Ohio county as well as that in Switzerland county, and the sale thereunder was not required to be made by the administrator. We do not think this judgment and decree is void, and this objection to the complaint is not well founded.

It is claimed, and insisted upon, that the complaint does not show a valid agreement with the minors, and that any consideration passed to them for the agreement. The complaint does not show that any of the defendants were minors,

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and it is not necessary to show that any consideration passed to them; if anything of value passed from the plaintiff, that might be a sufficient consideration for the agreement. The complaint alleges that the agreement was made between the bank and Frances, with the knowledge and consent of Josiah, Aldridge and Mortimer Dunning, by which agreement the bank was to pay to Frances \$281. This is a sufficient consideration for the agreement.

It is further objected that the circuit court of Switzerland county had no jurisdiction over the lands in Ohio county. We understand the complaint to allege that a part of the lands in controversy lie in Switzerland county and a part in Ohio county. The part in Switzerland county gives the circuit court of that county jurisdiction over the whole. There is no error in overruling the demurrers to the complaint.

The 2d specification of errors by Josiah and Mortimer Dunning was sustaining the demurrer to the third paragraph of their answer. This paragraph of the answer attempted to plead *res adjudicata*, by averring that the plaintiff had theretofore commenced a certain proceeding by motion or complaint on the — day of —, 1879, in the Switzerland Circuit Court, to have said court to declare whether said commissioner's sale was valid, or whether or no the plaintiff would obtain a good title if he should pay the balance of the purchase-money, and, if he will not, that said sale be set aside, and that the purchase-money paid by him be ordered to be paid back, and that he recover for improvements and taxes made and paid by him on the land; but if said sale is valid, that said agreement be enforced, and that the part of the purchase-money coming to Josiah, Aldridge and Mortimer Dunning be applied to the payment of said judgments, and that the money be distributed according to the rights of the several parties; that the clerk be enjoined from paying out the money to the heirs, and the commissioner be enjoined from collecting any more of it; that demurrers were filed by the several parties defendants, which were sustained by the court,

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and judgment was rendered, ordering said money to be divided among the heirs; that said complaint has been lost, and that no record exists of the filing of said complaint or motion, the filing of the demurrers thereto, or the action of the court thereon—nothing but the final order of the distribution of the money; and concluded by asking for a *nunc pro tunc* entry, making a record of the same.

This is entirely insufficient to procure a *nunc pro tunc* entry. There is nothing shown to amend by, and it can not amount to an answer of *res adjudicata*, there being no record whatever to sustain it. There was no error in sustaining the demurrer to it.

As to the conclusions of law, there is no necessity for discussing the question as to whether the minors are bound by the agreement. The court determined that question in favor of appellants, and the agreement need only be considered in connection with the fact that the appellee acted in good faith and has an equity in being protected against having to pay the value of the land twice, when only one payment was equitably due.

The principal question discussed arises upon the exceptions to the conclusions of law, which state that the judgments were liens upon the land, and the plaintiff having purchased at a sheriff's sale, under the judgments, is subrogated to the rights of the judgment lien holder, and entitled to be indemnified out of the proceeds of the commissioner's sale for the money he paid at the sheriff's sale.

A specific lien was declared by the court upon the lands in Ohio county, as well as upon the lands in Switzerland county, and they were all ordered to be sold for the payment of the judgments. The trouble was created by the commissioner selling the heirs' interest in the land on the partition proceedings, instead of the sheriff selling the interest of the estate in the lands, upon the specific order of the court, for the payment of the judgments. But, although it was sold in the partition proceedings, it is very evident that it was sold

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by the commissioner and purchased by the bank, for the purpose of applying the proceeds, in part, to the payment of the judgments.

The heirs held the land subject to the payment of these judgments, and have no equitable right to the proceeds of the sale, until these judgments have been paid. If the land had been sold by the administratrix for the purpose of paying the debts of the deceased generally, or these judgments in particular, they would have been required to be paid before any portion of the proceeds would be going to the heirs. And they, having received their share of the first instalment, we do not think that they have any equitable right to complain at appellee's being indemnified out of the remainder of the proceeds of the sale for the money he was compelled to pay on said judgments.

A party who purchases land at a sheriff's sale is subrogated to all the rights of the judgment creditor. *Seller v. Linger-man*, 24 Ind. 264. See petition for a rehearing.

The case of *Spray v. Rodman*, 43 Ind. 225, is similar in some respects to the one under consideration. That was a proceeding in partition; the land, not being divisible, was sold, and the purchaser paid the commissioner the full value of the land, without any knowledge of certain judgment liens, which judgments he was afterwards compelled to pay to protect his title. It was held that, the land having been converted into money, the rights of the parties to the money should be the same as they were in the land, and that the purchaser who had paid off the judgments was entitled to be subrogated to the rights in such money of the distributees thereof, who should have paid such judgments, and to receive from such commissioner, out of such distributees' shares, the amount paid to satisfy said judgments. Where one pays a debt which could not properly be called his own, but which it was his interest to pay, or which he might have been compelled to pay for another, the law subrogates him to all the rights of the creditor. In that case, it was said the

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purchaser had no knowledge of the existence of the judgments. In this case the purchase was made under an understood agreement that enough of the purchase-money was to be applied in payment of the judgments, and presents equally as strong, if not stronger, equities in favor of this purchaser. And, in support of this equitable right of subrogation, we cite the following cases: *Hawkins v. Miller*, 26 Ind. 173; *Troost v. Davis*, 31 Ind. 34; *Muir v. Berkshire*, 52 Ind. 149; *Hoffman v. Risk*, 58 Ind. 113; *Manford v. Firth*, 68 Ind. 83; *Lourey v. Byers*, 80 Ind. 443; *Stout v. Duncan*, 87 Ind. 383.

Appellee purchased the land at the commissioner's sale, agreeing to pay its full value, and has paid one-third of his bid. Appellants Aldridge, Josiah and Mortimer have received their shares of that payment. Appellee has been compelled to pay \$1,260 on the judgments, which were encumbrances upon the land, in order to protect his title. The heirs have no equitable claim on any further payments, until appellee has been repaid the amount so paid on said judgments. We think that he should be subrogated to the rights of said judgment creditor, and the commissioner be required to settle with him accordingly. There was no error in the courts overruling appellant's exceptions to the conclusions of law.

The last specification of error by Frances is, for overruling her motion to so modify the judgment as not to adjudge against her any more costs than she had made. The last specification of error by appellants Aldridge, Josiah and Mortimer also is, the overruling of their motion to so modify the judgment as not to render any personal judgment against them for costs.

The defendants jointly filed an answer in denial, and the minors, by their guardian *ad litem*, filed a separate and an additional paragraph of answer.

There was no separate issue tried and found in favor of appellant Frances, upon which the plaintiff could be held liable for any of the costs.

The defendants jointly contested the questions in issue

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throughout the trial, and we see no sufficient reason why the ordinary judgment for costs should not be rendered against all of them.

There was no error in overruling these motions to modify the judgment in relation to costs.

We find no error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, with costs.

No. 11,063.

## APP v. THE STATE.

**CRIMINAL LAW.—Keeping Devices for Gaming.—Indictment.**—An indictment for keeping a device for gaming, under section 2086, R. S. 1881, averring "that the defendant did, at the county and State aforesaid, unlawfully keep and exhibit a certain gaming apparatus, to wit, a faro bank, and then and there unlawfully kept the same for the purpose of wagering, winning and gaming thereon money and other articles of value," sufficiently charges the offence. It is not necessary in such case to describe the particular building or precise spot where the device was kept; properly naming the county and State is sufficient.

**SAME.—Change of Venue.—Jurisdiction.**—Jurisdiction vests in the court to which the change is taken in a criminal case, upon the deposit with its clerk of the original papers and a transcript of the proceedings of the court in which the indictment was found.

**SAME.—Presumption.**—Where a defendant, who obtains a change of venue, appears in the court to which the case was sent, and goes to trial without objecting to the jurisdiction or suggesting any defects or irregularities, it will be presumed, in the absence of a contrary showing, that jurisdiction was properly obtained.

**SAME.—Grand Jury.**—Where the record certified shows a due empanelling of the grand jury, it is sufficient without a specific statement of that fact in the clerk's certificate.

**SUPREME COURT.—Evidence.—Leading Questions.**—The Supreme Court will not reverse a case because leading questions were permitted, unless it appears that there was an abuse of discretion that did substantial injustice.

From the Carroll Circuit Court.

90	73
125	41
90	73
125	229

90	73
160	30

90	73
171	6
2171	407

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*A. W. Reynolds* and *E. B. Sellers*, for appellant.

*F. T. Hord*, Attorney General, and *R. Gregory*, Prosecuting Attorney for the State.

ELLIOTT, J.—The indictment upon which judgment was entered against appellant contains the following: "That the defendant did, at the county and State aforesaid, unlawfully keep and exhibit a certain gaming apparatus, to wit, a faro bank, and then and there unlawfully kept the same for the purpose of wagering, winning and gaming thereon money and other articles of value." The pleader's language may be justly subject to verbal criticism, but we think the offence is sufficiently charged.

Counsel for appellant are in error in asserting that it is necessary for the indictment in such a case as this to describe the particular building or precise spot where the gambling apparatus was kept; it is only necessary to properly name the county and State.

Where a change of venue is taken in a criminal case, jurisdiction vests in the court to which the change is taken upon the deposit with its clerk of the original papers and a transcript of the proceedings of the court in which the indictment was found.

Where an accused, who obtains a change of venue, appears in the court to which the case is sent, and goes to trial without objecting to the jurisdiction of the court, and without suggesting defects or irregularities, it will be presumed, in the absence of a contrary showing, that the officers did their duty, and that jurisdiction was properly obtained. *Duncan v. State*, 84 Ind. 204.

Where the record certified by the clerk shows a due empanelling of the grand jury, it is sufficient without a specific statement of that fact in the clerk's certificate. It is held in the case cited that the appearance of the essential facts in the transcript certified to this court is, at least, *prima facie* sufficient, and this is regarded by us as good law.

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 Ball, Administrator, v. Green *et al.*


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Cases are never reversed upon the ground that leading questions were permitted, unless it is made very clearly apparent that there was an abuse of discretion that did substantial injustice. A trial court has a large discretion in such cases, and its rulings will always be upheld where there is not a plain and inexcusable abuse of this discretionary power. There is no such abuse shown in the present case.

Judgment affirmed.

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 No. 8,945.

90	75
141	32

### BALL, ADMINISTRATOR, v. GREEN ET AL.

**DECEDENTS' ESTATES.**—*Mortgage of Real Estate by Heir.*—*Foreclosure.*—*Sale of Real Estate by Administrator.*—Where an heir executes a mortgage upon the real estate inherited by him, and the same is afterwards sold by the administrator of the ancestor for the payment of debts, the mortgagee is entitled to the excess of money arising therefrom, if any, and may, by foreclosure, before the settlement of such estate, obtain an order against the administrator, requiring him to pay such excess upon the mortgage.

**SAME.**—*Set-Off by Administrator.*—*Lien.*—In such case, the administrator can not, as against the excess, set off any sum the mortgagor may owe him or such estate, as the mortgagee has a lien upon the money superior to any claim of the administrator.

From the Henry Circuit Court.

*T. B. Redding*, for appellant.

**BEST, C.**—Stephen B. Adams died intestate, seized of the land in the complaint described, leaving surviving him his widow and eleven children, to whom the same descended. Thereafter, Jesse Adams, one of the children and one of the appellees, mortgaged the land to Alpheus Green to secure a note of \$310, dated December 10th, 1874, due in one year, with ten per cent. interest. Subsequently, the appellant, as administrator of the estate of Stephen B. Adams, sold that portion of the land which descended to the children for the

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Ball, Administrator, v. Green *et al.*

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payment of the decedent's debts, after which this action was brought by Alpheus Green against Jesse Adams, Mary Adams, his wife, and the appellant, to foreclose the mortgage and to obtain an order requiring the appellant to pay upon his mortgage, after the settlement of the estate, such portion of the sum for which the interest of Jesse Adams sold, not exceeding the amount due upon the mortgage, as was not needed for the payment of the decedent's debts. It was averred that Jesse Adams was insolvent, and that the land sold for a sum largely in excess of the amount required for the payment of the debts.

Jesse Adams and Mary Adams were defaulted. The appellant demurred to the complaint, for the want of facts. The demurrer was overruled, after which he filed an answer of five paragraphs. The second was the general denial, and the others were special. Demurrers were sustained to the special paragraphs, and judgment rendered as prayed.

These several rulings are assigned as error.

The appellant insists that the action is premature. This conclusion is based upon the assumption that the proceeds of the real estate must be regarded as personal property for distribution, and as an heir can not maintain an action for his distributive share until after final settlement of the estate the appellee, who, at most, only represents an heir, can not maintain this action. These assumptions are groundless. The case proceeds upon no such theory. The sale of the land divested the mortgage, but the proceeds were bound by the encumbrance the same as though the estate had not been altered. "Where either real or personal estate upon which there is an outstanding mortgage, is turned into money, the rights of the mortgagee continue unaltered, and the court will direct the application of the money according to the rights of the parties as they existed previous to the alteration of the estate." *Astor v. Miller*, 2 Paige, 68; *Brown v. Stewart*, 1 Md. Ch. 87; *Gimbel v. Stolle*, 59 Ind. 446.

The proceeds of the fund being bound by the mortgage, the

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Ball, Administrator, v. Green *et al.*

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action was properly brought to compel the appellant who possessed the fund to apply it upon the mortgage. The fact that the estate was unsettled formed no obstacle to the maintenance of the action. Were the appellee compelled to await such event, he might, and probably would, lose his lien. He was entitled to the order while the appellant had the proceeds in his hands, as afterward the order would be unavailing. The action was well brought and the demurrer properly overruled.

The third paragraph of the answer averred that the estate was unsettled, and that the amount to be paid to Jesse Adams was then unknown. This constituted no defence, as has been shown, and the demurrer was properly sustained to it.

The remaining paragraphs alleged matters in defence as set-offs. Some of them alleged that Jesse Adams was indebted to his father in his lifetime, and is still indebted to his estate, in a sum in excess of anything that will be due him after the payment of the decedent's debts. The others averred that Jesse Adams was indebted to the estate in the sum of \$138.14 for property purchased by him at the administrator's sale, and this sum the appellant offered to set off against an equal sum arising from the sale of the land.

These several paragraphs are based upon the theory that the administrator had the right, as against the appellee, to apply any sum of money in his hands arising from the sale of such realty, and belonging to Jesse Adams, in payment of any sum that said Adams owed the estate or the administrator. No authority is cited to support this position, and we know of none. Nor do we believe it can be maintained on principle. The administrator had authority to sell this land to pay the decedent's debts, but no power to sell in order to collect a claim from the owner. After the payment of the decedent's debts, the residue of the money, if any, will belong to Jesse Adams, and its retention by the administrator will not make the estate the debtor of Adams, nor will it make the administrator such debtor except at the option of Adams. In addition to this, the appellee has a

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 Jones, Trustee, v. Dunn.
 

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lien upon the money that is superior to any claim of the administrator, if indeed he has any, and which was not impaired or affected by the accidental circumstances, that he had the custody of the money, and that Adams was indebted to him and to the estate. As against the appellee, in our opinion, he could not retain the money for the purpose of collecting from Adams claims due the estate. As to these, he occupied no better position than any other creditor, and as the appellee had acquired a specific lien, his claim must prevail. For these reasons, we think the demurrers to these several paragraphs of the answer were properly sustained, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellant's costs.

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 No. 10,641.

JONES, TRUSTEE, v. DUNN.

DRAINAGE OF HIGHWAYS.—*Township Trustee.—Superintendent of Roads.—Statute Construed.*—Sections 5064 to 5090, R. S. 1881, so far modify the provisions of section 4281, R. S. 1881, that the proceedings authorized by the latter section, for the drainage of highways, can only be instituted and prosecuted by the superintendent of roads, and not by the township trustee.

From the Jasper Circuit Court.

*M. F. Chilcote*, for appellant.

*R. S. Dwiggins* and *Z. Dwiggins*, for appellee.

HOWK, J.—The only error assigned by the appellant on the record of this cause is this: "The court erred in sustaining appellee's motion to dismiss the petition."

In this petition the appellant alleged, in substance, that he was the trustee of the civil township of Kankakee, in Jasper county; that three public highways in said township, describ-

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ing them, would each be benefited by drainage, which could not, however, be accomplished in the best and cheapest manner, without affecting the lands of others; that he believed that such drainage could be best had by a ditch, describing it; that he believed, also, that a proper work to accomplish such drainage would affect the following lands in Jasper county, in addition to such public highways, to wit: (Description of lands, with names of owners); that he also believed that the proposed drainage would be of public utility; and that he also believed that the costs, damages and expenses of such drainage would be less than the benefits to the owners of lands likely to be benefited thereby. Wherefore he prayed for such drainage.

The appellee, one of the land-owners named in such petition, appeared thereto and moved the court in writing to dismiss the petition, for the following reasons:

"1. There is no law authorizing the said trustee to file said petition and bring said action;

"2. The facts alleged in said petition do not give the court jurisdiction to take any steps whatever in said cause;

"3. There has been no sufficient notice given of the pendency of said petition. The notice and proof of notice filed with said petition show that the notices were posted on the 17th day of December, 1881, which was less than twenty days before the first day of the present term of this court;

"4. At the time of the posting of the notices of said petition, no petition was on file in this court. Said notices, as appears by the proof of posting on file in this case, were posted on the 17th day of December, 1881, and the petition in this case was not filed until January 10th, 1882."

The record shows that the trial court sustained appellee's motion, and dismissed the appellant's petition, "on the ground that, in the opinion of the court, section 9 of 'An act concerning drainage,' approved April 8th, 1881, was repealed by 'An act concerning roads and highways,' approved April 15th, 1881." To this ruling the appellant excepted, and his peti-

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tion was dismissed by the court, at his costs, and judgment was rendered accordingly.

We are of opinion that the court committed no error in sustaining appellee's motion to dismiss the appellant's petition. In section 4281, R. S. 1881, which is section 9 of "An act concerning drainage," approved April 8th, 1881, under which section the appellant filed his petition in this case, it was provided that "Whenever any such drainage will benefit any public highway, the township trustee of the township in which the same is, may, as such, apply for drainage as provided in this act," etc. Under the law in force at the time of the approval of such act concerning drainage, the township trustee had control of the highways in his township; and it may well be supposed that section 9 of such act became a law, under the expectation, at least, that the control of the highways in each township would continue and remain in the proper township trustee. When, however, the later act concerning roads and highways, approved April 15th, 1881, became a law, the office of superintendent of roads in each civil township was thereby created; and, thereafter, under the provisions of such later act, the entire charge and control of all roads, highways and bridges in his township was committed to such superintendent of roads, who should "cause the same to be kept in as good repair as the prudent use of the means in his hands will permit." Sections 5064 to 5090, R. S. 1881.

It can hardly be said, we think, that section 9 of the drainage act is wholly repealed by the provisions of the later act, concerning roads and highways. But as the effect of the later act is to take from the township trustee the entire control of all roads, highways and bridges in his township, and commit the same to the superintendent of roads therein, it must be held, as it seems to us, that the provisions of section 9 of the drainage act (sec. 4281, R. S. 1881), if enforceable at all, can only be enforced by the superintendent of roads, and not by the township trustee.

The appellant's petition, therefore, was correctly dismissed.

The judgment is affirmed, with costs.

Klippel v. Shields *et al.*

No. 10,400.

## KLIPPEL v. SHIELDS ET AL.

**JUDGMENT.**—*Payment.*—Payment by one primarily liable as a judgment debtor extinguishes the judgment.

**SAME.**—*Sheriff's Sale.*—*Assignment of Certificate.*—*Joint Judgment Debtor.*—The land of one of two joint judgment debtors, both principals, was bid in by the plaintiff, whereupon the other debtor paid the debt and took an assignment of the sheriff's certificate, and afterwards caused a sheriff's deed to be executed to his wife.

**Held,** that the wife took no title, the payment made having extinguished the judgment.

From the Jackson Circuit Court.

*E. C. Devore* and *R. M. Patrick*, for appellant.

*B. H. Burrell*, *F. Emerson* and *A. P. Charles*, for appellees.

**ELLIOTT, J.**—Appellant claims title to the real estate in controversy, and brought this action to recover possession of it, but was defeated on the trial.

We are without a brief from the appellee, and this has greatly increased our labor, as the record is voluminous and the questions involved not clearly disclosed. As we gather the facts, they are substantially as follows: On the 4th day of May, 1871, Thomas L. Ewing and Lycurgus Shields were indebted to James H. Green in the sum of \$6,000, and to secure this indebtedness Ewing and wife executed a mortgage on land, but not on that in controversy; this mortgage was foreclosed in May, 1872, and a personal judgment rendered against Shields and Ewing for about \$7,000; on the 7th of August, 1872, Ewing and wife conveyed the land here in dispute to Henry Loscent and John C. Brunett; on the 22d day of March, 1873, the land embraced in the mortgage to Green was sold by the sheriff and was bought by Green; the land did not sell for enough to pay the judgment, and other tracts of land belonging to Ewing were levied on, and among them was that here the subject of controversy; this

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126	419
90	81
126	147
130	812
90	81
152	560
152	562

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Klippel v. Shields *et al.*

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was sold by the sheriff on the 24th day of May, 1873, to Green, who afterwards assigned the sheriff's certificate to Lycurgus Shields; Green testified that Shields paid the judgment by executing two promissory notes, but neither he nor any other witness testified that there was any agreement that the notes should operate otherwise than as an ordinary payment of the judgment. It appears, therefore, that appellee's only title to the land is that derived through the sheriff's certificate issued on the sale made upon the joint judgment against him and Ewing. On the 23d of May, 1873, Loscent and wife, the grantees of Ewing, executed a mortgage to appellant on one-half of the land in controversy; on this mortgage decree and judgment were duly entered and sale regularly made to the appellant by the sheriff of Jackson county. On the 21st day of October, 1872, Brunett and wife executed a mortgage on the one-half of the land to Smith Vawter, and on this mortgage decree was entered and sale made to the appellant. The title of the party just named is rested upon the deeds made to him by the sheriff by virtue of the decrees and sales last mentioned.

We are unable to perceive any ground upon which the judgment of the trial court can legally rest. The payment of the judgment in favor of Green by one of the two joint debtors was an extinguishment, and, of course, this rendered it legally impossible to enforce it by the execution of a deed. Payment by one primarily liable as a judgment debtor extinguishes the judgment. *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers, etc., Bank*, 74 N. Y. 228; *Hammatt v. Wyman*, 9 Mass. 138; *Preslar v. Stallworth*, 37 Ala. 402; *Towse v. Felton*, 7 Jones (N. C.) 216; *Hinton v. Odenheimer*, 4 Jones Eq. 406. There are cases where a different rule applies, as where the person who pays the debt occupies the position of surety or some similar relation, but the present case does not belong to that class. *Spray v. Rodman*, 43 Ind. 225.

The fact that the deed was made to the wife of Lycurgus Shields does not affect the operation of the rule. The pay-

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The Ohio Falls Car Company v. Menzies.

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ment was by him, and this had the effect to completely extinguish the judgment, and no further valid proceedings could be had upon it. *Myers v. Cochran*, 29 Ind. 256; *Shields v. Moore*, 84 Ind. 440. The controlling fact in such a case as this is the payment by one legally bound to pay, and the fact that an assignment is made to him or to some one else is not of controlling importance. If one whose duty it is to pay the debt makes the payment, then an assignment will not keep the debt alive. *Sheldon Subrogation*, section 50.

Judgment reversed.

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No. 10,678.

THE OHIO FALLS CAR COMPANY v. MENZIES.

**CONTRACT.—Waiver of Condition.**—A written contract provided that the plaintiff should furnish the defendant 1,000,000 feet of lumber, described, 150,000 feet deliverable per month, commencing at a date fixed, at J., to be paid for on arrival with bill of lading, etc.; a single shipment only was made, three months after the time fixed for the first delivery, no bill of lading accompanying it, but the lumber was received without objection. *Held*, that the receipt of the lumber was a waiver of the conditions concerning time of delivery and bill of lading, and that the plaintiff could recover upon the contract.

From the Floyd Circuit Court.

*J. G. Howard, J. F. Reed*, — *Stannard and A. Dowling*,  
for appellant.

*J. K. Marsh and A. P. Hovey*, for appellee.

**MORRIS, C.**—The appellee sued the appellant for the price of a quantity of lumber, which he claims to have sold and delivered to the appellant, under and pursuant to the terms of a written contract between the parties, a copy of which is filed with and made a part of the complaint.

The appellant answered in two paragraphs, the first being the general denial and the second payment.

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The Ohio Falls Car Company v. Menzies.

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The suit was commenced in Clark county and taken by change of venue to Floyd.

The cause was submitted to the court for trial; the finding of the court was in favor of the appellee; the appellant moved for a new trial, on the grounds that the finding of the court was contrary to law and not supported by sufficient evidence. The court overruled the motion and rendered judgment for the appellee. The overruling of the motion is assigned as error.

The appellant insists that the evidence does not tend to show a right on the part of the appellee to recover on the written contract upon which the action is brought. This is the only question in the case. The counsel for the appellant say:

“By the special contract, which is the foundation of the action, the appellee agrees and binds himself to furnish and deliver at the wharf, at the city of Jeffersonville, 1,000,000 feet of white ash lumber (of the dimensions and at the prices therein mentioned), to be delivered at the rate of 150,000 feet per month, commencing on or before the 1st day of August, 1881, and on arrival of said lumber at said city of Jeffersonville, and receipt of bill of lading with invoice attached, the appellant agreed to forward two-thirds the amount of invoice to appellee, the balance to be paid on the 15th of the following month.”

The appellant contends, correctly we think, that the testimony shows that the lumber sued for was the only shipment of lumber made by the appellee, and that it arrived at Jeffersonville on the 18th of November, 1881; that the barges on which the lumber was loaded for shipment to Jeffersonville were driven from the wharf where loaded by a storm, for which reason no bill of lading was made out before the barges left, but that upon their arrival at Jeffersonville an estimated bill of lading of the quantity of lumber was made out. No invoice of the lumber or other bill of lading was made or delivered to the appellant. The testimony in the case showed, or tended to show, that the appellant received and took possession of the lumber, without having received an invoice and

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The Ohio Falls Car Company v. Menzies.

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bill of lading; that it was satisfied as to the quality of the lumber, and did not object to it on the ground that it had not been delivered in time, or that the appellee had failed to deliver lumber during the previous months as provided for in the contract. There was some dispute between the parties as to the quality of lumber delivered, and the appellant contended that the proper evidence of the quantity had not been furnished; that no bill of lading, with an invoice of the quantity of lumber, had been furnished it. The appellant paid the freight and also paid the appellee \$2,560, being two-thirds of the price on the estimated quantity of lumber, the estimate having been made for the purpose at 200,000 feet. This estimate was not to be conclusive. The appellant produced testimony tending to show an offer on its part to cancel the contract. The notice of this offer did not reach the appellee until after the lumber had arrived at Jeffersonville.

The appellant insists that the appellee can not, upon the facts proved, recover upon the contract, for two reasons:

*First.* Because the evidence shows that the appellee had not performed the contract on his part by furnishing lumber as therein provided during the previous months of August, September and October.

*Secondly.* Because the appellee had failed to furnish the appellant a bill of lading with an invoice of the quantity of lumber attached, as provided for in the contract.

Perhaps the appellant might, though we do not decide the question, have refused to receive the lumber in question on the ground that the appellee had failed to furnish lumber during the three preceding months as agreed. But it did not refuse to accept the lumber on the contract for any such reason. No such objection is shown to have been made, and the appellant did accept and take into its possession the lumber sued for. It was quite competent for the appellant to waive the time of performance, and that, too, without rescinding or doing away with the contract.

In the case of *Williams v. Bank*, 2 Pet. 96, the court says:

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"If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent, the performance, the opposite party is excused from proving a strict compliance with the condition." See, also, *Attix v. Pelan*, 5 Iowa, 336.

"If," says Addison, "it is covenanted by the ship owner that the ship shall be at a particular port by a day named ready to take a cargo on board, the charterer or freighter may not be bound by his covenant or agreement to ship a cargo on board and pay freight, if the vessel is not ready at the place appointed by the day named; but, if, after the day has passed, the cargo is shipped on board pursuant to the covenant, the time of shipment can not be relied upon as a condition precedent to the payment of the freight." Addison Contracts, section 947.

In the case of *Simpson v. Crippin*, L. R. 8 Q. B. 14, the defendants had agreed to supply the plaintiff 6,000 to 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery, "in equal monthly quantities during the period of twelve months from the 1st of July next." During the first month, July, the plaintiff sent wagons for about 158 tons only, and on the 1st of August the defendant wrote that the contract was cancelled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. The plaintiff refused to allow the contract to be cancelled, and the action was for the defendant's refusal to go on with the contract. The court held that, although the plaintiff had committed a breach of the contract by failing to send wagons in sufficient numbers the first month, the breach was a good ground for compensation, but did not justify the defendant in rescinding the contract. To the same effect is the case of *Haines v. Tucker*, 50 N. H. 307. See, also, *Masonic, etc., Ass'n v. Beck*, 77 Ind. 203, 207 (40 Am. R. 295); *Blair v. Hamilton*, 48 Ind. 32.

We think the court did not err in overruling the motion for a new trial on the ground that the appellee had not de-

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 Granger v. Adams *et al.*


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livered lumber at the time stated in the contract. The acceptance of the lumber was a waiver of this objection. The appellant, by taking possession of the lumber, also waived the production of the invoice and bill of lading. Had the appellee furnished the invoice and bill of lading, as required by the contract, they would not have been conclusive upon the appellant as to the quantity of lumber. It would still have had the right to resort to other means for determining the quantity of lumber shipped. It is fairly inferable, from the evidence, that the appellant took possession of the lumber with knowledge of the fact that no bill of lading had been made, and of the circumstances which had prevented the appellee from procuring it. By taking possession of the lumber, to which the appellee was assenting, the appellant must be held to have assumed the burden of ascertaining the quantity of lumber shipped, and to have waived its right to an invoice and bill of lading, which enabled the appellee to sue upon the contract as fully as if an invoice had been furnished. There was no error in overruling the motion for a new trial.

**PER CURIAM.**—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

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 No. 9834.

**GRANGER v. ADAMS ET AL.**

**CHATTEL MORTGAGE.**—*Where to be Recorded.*—It is essential to the validity of a chattel mortgage as against creditors, that it should be recorded in each of the counties where the mortgagors severally reside.

**SAME.**—*Mortgage Executed by Partners.*—A chattel mortgage executed by partners must, as against creditors, be recorded in all the counties wherein the partners reside, and it is not sufficient to record it in the county where one partner resides and the firm does business.

From the Superior Court of Marion county.

*J. C. Denny* and *W. L. Granger*, for appellant.

*J. L. McMaster* and *A. Boice*, for appellees.

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133	474
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149	582

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ELLIOTT, J.—The question which this record presents is this: Is a mortgage on partnership personal property executed by one partner in behalf of the firm, recorded in the county where the property is situated and the business of the partnership conducted, and where the partner executing it resides, but not recorded in the county where the other members of the firm reside, valid as against creditors?

It is settled that a mortgage of goods, where possession is retained by the mortgagor, is not valid as against creditors unless executed and recorded in strict accordance with the statute. The common law did not recognize the validity of such instruments against creditors, and the cases are well agreed that one who asserts a right under such an instrument paramount to the claims of creditors, must show that all has been done that the statute requires. At common law, possession was essential to the validity of the mortgage as against creditors of the mortgagors. Registration is made by law the substitute for possession, and, in order that registration shall have this effect, it must be such as the statute prescribes.

Our statute provides that "No assignment of goods, by way of mortgage, shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof." R. S. 1881, sec. 4913. This provision makes it essential to the validity of a chattel mortgage executed by two or more persons, residents of different counties, that it should be recorded in each of the several counties. *De Courcey v. Collins*, 21 N. J. Eq. 357; *Rich v. Roberts*, 48 Maine, 548.

The fact that the mortgage is executed by a partnership composed of several members does not change the rule. All the partners are mortgagors, and, as the firm can have no place of residence, the residence of the mortgagors must be that of the individuals composing the partnership. In ordinary

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legal proceedings, the partnership is reached through the individual partners. If an action is brought against partners, process must be served upon each member of the firm; if actions are instituted, it must be in the name of all the members. The act of the partnership is the act of all the partners, the firm representing them in the act. *Dickson v. Indianapolis, etc., Co.*, 63 Ind. 9; *Crosby v. Jeroloman*, 37 Ind. 264. It seems clear upon principle that a mortgage of goods executed by a partnership must be recorded in the counties where the partners reside, and so the authorities declare. *Stewart v. Platt*, 101 U. S. 731; *Kane v. Rice*, 10 N. B. Reg. 469; *DeCoursey v. Collins, supra*; *Herman Chat. Mortg.*, p. 162; *Jones Chat. Mortg.*, section 257. In the case of *Hubbardston, etc., Co. v. Covert*, 35 Mich. 254, a somewhat different doctrine is laid down, but that case is very essentially restricted by the later case of *Briggs v. Leitell*, 41 Mich. 79, wherein it is declared that the former decision does not apply to cases where all the partners are residents of the State.

Judgment affirmed.

Petition for a rehearing overruled.

No. 11,064.

## KEITH v. THE STATE.

**INDICTMENT.—Venue.—Keeping Gaming Apparatus.**—In an indictment for keeping gaming apparatus, in violation of section 2086, R. S. 1881, it is sufficient to aver that the offence was committed in the proper county and State, no more particular averment of place being necessary.

**SAME.—Change of Venue.—Clerk's Duty.—Transcript.**—Where a change of venue has been taken, it is unnecessary and impossible to show by the transcript sent to the county to which the change is taken, that the original indictment has been transmitted. It must be sent however.

From the Carroll Circuit Court.

A. W. Reynolds and E. B. Sellers, for appellant.

F. T. Hord, Attorney General, R. Gregory, Prosecuting Attorney, and W. B. Hord, for the State.

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166	574

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170	128

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171	6

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ZOLLARS, J.—Appellant was indicted by the grand jury of White county on the charge of keeping for gain a gaming apparatus called *roulette*. Upon his application, the venue was changed to the Carroll Circuit Court, where he was tried, convicted and fined. From this judgment he prosecutes this appeal.

We shall consider the errors assigned in this court, in the order discussed by appellant's counsel. The prosecution is based upon section 2086, R. S. 1881, which provides that whoever keeps or exhibits for gain, or to win or gain money or other property, any gaming table, roulette, etc., shall be fined, etc.

It is insisted that the indictment is insufficient, and that the court below erred in overruling a motion to quash.

The first objection urged against the indictment is, that it does not appear from the averments therein that the roulette was kept and exhibited to win money, etc. In this counsel are mistaken. The averments are that "Harrison Keith \* \* \* did then and there unlawfully keep and exhibit a certain gaming apparatus, to wit, a roulette wheel, and then and there unlawfully kept the same for the purpose of wagering, winning and gaining thereon money," etc.

It is next insisted that the indictment is defective in not describing with sufficient certainty the place where the roulette was kept and exhibited. This objection is not well taken. The offence is charged to have been committed in the county of White, State of Indiana. In charging an offence of this kind we think this is entirely sufficient. The statute does not make any particular place or locality an ingredient of the offence, nor can any judgment rendered upon a conviction have reference to any particular place or locality. Moore Crim. Law, section 165; 1 Bishop Crim. Proc. 372; *Howard v. State*, 6 Ind. 444; *App v. State*, ante, p. 73.

The next reason urged for a reversal of the judgment is thus stated by appellant's counsel: "In the Carroll Circuit Court, the appellant objected to the court assuming jurisdiction over him or the cause, and moved to quash the proceed-

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ings. The objection to the proceedings and judgment of the Carroll Circuit Court is this, that the transcript of the proceedings in the White Circuit Court does not disclose the fact as to whether the original indictment was transferred or transmitted to the Carroll Circuit Court." This objection, we think, is not well taken. Following the title of the cause it is stated in the record, as made by the clerk of the Carroll Circuit Court, that on the 3d day of April, 1883, the sheriff of White county deposited in the clerk's office of Carroll county, sealed up and directed to said clerk, "the following transcript of the proceedings and orders of the White Circuit Court in the above entitled cause, together with the original papers therein, being the original indictment," etc.

Following this, the transcript is set out in full. In this transcript it is shown that an indictment, number 15, for keeping gaming apparatus, was returned by the grand jury of White county, "which reads as follows." Here follows the indictment, set out in full, with the endorsements thereon.

Following this is the application for and the order granting a change of venue from the county, and the recognizance of appellant to appear in the Carroll Circuit Court, etc., to answer to an indictment against him for keeping a gaming apparatus, etc. The clerk of the White Circuit Court, in his certificate to the transcript, certifies that it is a full, true and complete transcript of the proceedings in the White Circuit Court, of the return by the grand jury of an indictment numbered 15, against Harrison Keith, for keeping gaming apparatus, and the proceedings thereon, etc. In the record before us, there is the following statement by the clerk of the Carroll Circuit Court: "Which original indictment is as follows." Here the indictment is set out in full, and is identical with that set out in the transcript as made by the clerk of the White Circuit Court. In his certificate to the record, the clerk of the Carroll Circuit Court certifies that the record is a full, true and complete copy of all the proceedings in the cause and papers filed, and that the record

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contains a true copy of the original indictment and papers filed in his office by the sheriff of White county. From these several statements in the transcript and record, there can be no manner of doubt about the original indictment having been filed by the proper officer in the clerk's office of Carroll county, or of appellant having been tried upon it.

The statute fixing the duties of clerks, after a change of venue has been granted, is as follows: "The clerk must thereupon immediately make a transcript of the proceedings and orders of court, and, having sealed up the same with the original papers, shall deliver them to the sheriff, who must, without delay, deposit them in the clerk's office of the proper county," etc. Section 1771, R. S. 1881. When so filed, the jurisdiction of the latter court is complete. Section 1772, R. S. 1881. The clerk of the White Circuit Court was, under section 1771, *supra*, required to make a complete transcript of the proceedings in the cause in that court, and, having sealed up the same with the original papers, deliver them to the sheriff. It was his duty, also, to attach to the transcript a proper certificate. But we know of no statute or rule of practice which required him to certify in any way that the papers and transcript were transmitted to the clerk's office of Carroll county. He was required to certify to the proceedings in the cause in the White Circuit Court, but not to what he may have done after those proceedings were closed. Indeed, it is difficult to see how he could certify to a transmission of the papers, as they could not be transmitted until after they were out of his custody.

If the record were less explicit upon the transmission and filing of the original indictment in the clerk's office in Carroll county, it would be sufficient, as the presumption would obtain that the officers did their duty under the law. *Leslie v. State*, 83 Ind. 180; *Duncan v. State*, 84 Ind. 204. If the record, as made by the clerk of the Carroll Circuit Court, contained nothing showing that the indictment was filed in the clerk's office in Carroll county, a different question would be

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presented, and the case of *Adell v. State*, 34 Ind. 543, might be cited as authority.

The indictment, "No. 15," charges appellant with unlawfully keeping and exhibiting gaming apparatus. In his certificate, and other portions of the transcript, the clerk of the White Circuit Court describes the indictment, "No. 15," returned by the grand jury, as one for keeping gaming apparatus. Appellant contends that by reason of this difference in the indictment, and the description by the clerk, we can not know that the indictment upon which he was tried is the original indictment. This argument is too technical. The number is the same, and the indictment is set out in full in the transcript, and identified as the one returned by the grand jury.

Having examined all of the questions made and discussed by counsel, and finding no error in the record, the judgment is affirmed, at the costs of appellant.

No. 9543.

## BROWN v. ANDERSON.

**REAL ESTATE, ACTION TO RECOVER.—Ejectment.—Complaint.—Jurisdiction.—Presumption.**—Where a complaint in ejectment does not disclose the county in which the land is situated, and a court of general jurisdiction, without objection, proceeds to judgment, it will be presumed after judgment that the land is in the county where the suit was begun.

**SAME.—Description of Lands.**—A description of lands in a complaint for possession is sufficient if, by the aid of a competent surveyor and persons knowing the location of monuments mentioned as points in the boundaries, the lands can be found.

**SAME.—Evidence.—Declarations.—Fence.—Boundaries.**—Whether a certain fence was the correct boundary between the lands of the plaintiff and defendant, viz., the line between the southeast and southwest quarters of section 19, was in question. The same line of fence continued south beyond the lands of these parties, the plaintiff's ancestor, from whom he had inherited, once owning lands of which the fence extended south was apparently the western boundary, viz., the northeast quarter of sec-

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126	357
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133	292
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135	91
134	620
90	93
148	13
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163	548
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tion 30. Evidence of the declarations of the ancestor that this fence in section 30 was too far west was held to be immaterial, and, therefore, properly rejected.

**SAME.—Survey.—Change of Boundaries by Partition Commissioners.**—A survey fixing a corner, made by a private surveyor, and not at the instance of any of the parties to a suit or their privies, and without notice to them, is not evidence against either of them; nor can commissioners making partition, by a survey, change the boundaries of the lands parted, to the profit of the adjacent owners.

**SAME.—Title by Occupancy.—Adverse Possession.—Statute of Limitation.—Prescription.**—Continuous occupancy and use of land as owner for twenty years to a fence really not upon the true boundary line, takes away the title of the real owner, and transfers it to such occupant, so that he may maintain ejectment.

**INSTRUCTIONS.—Errors Cured.**—An instruction, incorrect by reason of the omission to state a proper qualification of a rule of law, is not available error, if the omission be supplied by other instructions.

From the Switzerland Circuit Court.

*W. R. Johnston, F. M. Griffiths, W. D. Ward and T. Livings*, for appellant.

*S. Carter, J. D. Works and J. A. Works*, for appellee.

**HAMMOND, J.**—Action by appellee against appellant to recover possession of real estate. Trial by jury; verdict for appellee, and judgment on verdict over appellant's motion for a new trial.

The appellant assigns in this court the following errors:

"1. The complaint does not state facts sufficient to constitute a cause of action.

"2. The court erred in sustaining the demurrer to the first paragraph of the answer.

"3. The court erred in overruling the motion for a new trial."

The complaint is as follows: "The plaintiff, Thomas Anderson, complains of the defendant, Merritt Brown, and says that he is the owner in fee simple and entitled to the possession of a tract of land in section 19, town. 2, range 3 west, commencing at a point fifteen rods and twenty links north of the south line of said section, in the center of the fence dividing the lands of the plaintiff from the lands of the defend-

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ant, and which fence had stood as dividing the lands of the plaintiff and defendant for forty years last past, prior to its removal; thence north with the center of said fence, prior to its removal, fifty-three rods and thirteen links to a point in the center of said fence, prior to its removal; thence east two rods and seven links; thence south to a point fifteen rods and twenty links north of the south line of said section, and one rod and sixteen links east of the place of beginning; thence west one rod and sixteen links to the place of beginning; and that the said Merritt Brown now holds possession of said land without right, and for one month past has unlawfully kept the plaintiff out of possession. Wherefore he demands," etc.

The first objection to the complaint is that it does not state in what county the real estate is situated. The statute requires actions to recover real estate to be brought in the county where the land, or some part of it, is located. Code 1852, section 28; R. S. 1881, section 307. But where, as in the present case, a court of general jurisdiction takes jurisdiction and tries and determines a suit, without objection, the presumption is that the real estate is in the county where the action was commenced. *Brownfield v. Weicht*, 9 Ind. 394; *Ragan v. Haynes*, 10 Ind. 348; *Godfrey v. Godfrey*, 17 Ind. 6; *Houk v. Barthold*, 73 Ind. 21; *Wilcox v. Moudy*, 82 Ind. 219.

It is also objected to the complaint that the description of the land, in other respects, is not sufficient for its identification. Assuming, as we must, under the authorities above cited, that the land is in Switzerland county, we think it could be found with the assistance of a competent surveyor, aided by one having knowledge of the former location of the fence referred to. The land is shown to be in section 19, township 2, range 3 west, and we judicially know that there is but one section of land in that county thus located. The place of beginning of the strip of ground in question is at a point fifteen rods and twenty links north of the south line of said section and at the center of a fence running north and south on the

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line between the lands of the appellee and the appellant, which fence had stood as such line for forty years. For the purposes of the objection now under consideration, the fact that there was such a fence as that mentioned is to be taken as true; and, if so, it may be presumed that the place where it stood so long can be found, and having thus ascertained a starting point, the courses and distances given in the complaint readily establish the boundaries of the land in dispute.

As to the second error assigned by the appellant in relation to the sustaining of the demurrer to the first paragraph of the answer, this is not urged in the brief of his counsel, and is, therefore, considered as waived.

Before considering the alleged error of the trial court in overruling the appellant's motion for a new trial, it is proper to state that the evidence showed that the appellant owned the east half of the southwest quarter of said section 19, and that the appellee owned land in the west half of the southeast quarter of the same section, adjoining and east of the said appellant's land. There was evidence tending to show that there had been for a long time some dispute as to the location of the dividing line between their lands. The evidence also tended to show that for more than twenty years there had been standing a partition fence which had been put up as on the line, or part of the line, between the east half of the southwest quarter and the west half of the southeast quarter of said section, and that the parties, and those under whom they claimed title, had, respectively, occupied and cultivated the land during the existence of said fence, on each side of and up to the same, as their own. A short time before the commencement of this action, the appellant, without the appellee's consent, moved this fence east so as to bring into his, the appellant's, enclosure the strip of ground now in controversy.

We will notice such objections only to the overruling of the appellant's motion for a new trial as his counsel have discussed in this court.

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There was evidence showing that the land owned by the appellee formerly belonged to his father, John Anderson, who, also, at the same time, owned ten acres in the northwest corner of the northeast quarter of section 30, lying south of and adjoining said section 19. The appellant, at the trial, introduced as a witness one Jacob Banta, who testified that he owned land in section 30. The appellant then offered to prove by the witness that in 1835, after he had purchased the northwest quarter of section 30, and while the east line of it was being run, he had a conversation with John Anderson about the line of the fence on the east of the land of the witness and on the west of the ten acres of said John Anderson; and that John Anderson in that conversation said he knew that the fence was not on the true line, but was too far west, and that he would move it further east to the true line whenever the witness desired him to do so. The appellant also proposed to prove that the fence on the line in dispute in section 19 ran in a continuous line with the fence in section 30, about which said conversation was had. The court, on the appellee's objection, refused to admit this evidence, and the appellant excepted.

We think there was no substantial error in rejecting the evidence, on the ground of immateriality, if on no other. While the fence talked about was on a continuous line with the fence in dispute, it was not the same fence. It was not offered to prove how much the fence spoken of was too far west of the line; if it was any distance, however trifling, west of the line, it could have been said that it was too far west of it. Its distance off the line, so far as it would appear from the offered evidence, may have been so slight that a continuous line running north would not materially, if at all, have varied from the true line between the lands of the appellee and the appellant.

At the trial, the appellant also offered to prove by one John H. Brown that the southeast corner of section 19 was

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Brown v. Anderson.

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in dispute about the year 1850, and that, for the purpose of ascertaining its location, the owners of real estate cornering at that point employed a competent surveyor, who, after running lines and making measurements from other section corners, placed a stone at a point ascertained by him to be the southeast corner of said section 19. There was, also, evidence tending to show that, if the corner so established was correct, the fence in dispute, by measurement from that corner, was west of the half-section line. It does not appear, nor was it offered to prove, that any one having any interest in land now owned by either party to this action had anything to do with that survey. The survey was done at the instance of parties other than those under whom the parties to this action claim title. It was not made by a county surveyor, nor in accordance with the provisions of the statute. We think the corner established by the survey thus made was not binding upon, nor evidence against, the appellee, nor those through whom he derived title. It is clear, we think, that no survey, except as to the parties agreeing to it, is binding, unless made by the county surveyor, or his deputy, in the manner provided by law. The law indicates a proper method for establishing lines and corners when they are in dispute, and this method, properly followed, binds all concerned, and the record of it is conclusive evidence. But such is not the case with respect to any other survey, except as to those who may voluntarily have bound themselves by it. There was no error in rejecting the evidence.

The appellant excepted to the first, second, third and fourth instructions given by the court to the jury at the request of the appellee, and made the giving of the same one of the grounds of his motion for a new trial. No objection, however, is made in this court to the second instruction.

The first instruction was as follows: "If you find from the evidence that there has been a fence standing between the lands occupied by the plaintiff and the defendant, and by

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persons through whom they claim title, and that the fence stood on the same line for twenty years, or more, before it was removed, and the plaintiff, and persons through whom he claims title, cultivated and used the land on the side occupied by him, including the land in controversy, cultivating and using the same as their own, up to the line of the fence, and using the crops raised thereon as their own for twenty years or more, this would fix the line between them, and the fact that the fence may not have been on the true half-section line would make no difference."

The law seems to be well settled that the continuous adverse possession of real estate, for such time as bars its recovery by the statute of limitations, takes away the title of the real owner and, in legal effect, transfers it to the adverse occupant. The statute of limitations in such case gives a perfect title. *Bowen v. Preston*, 48 Ind. 367; *Munshower v. Patton*, 10 Sergeant & Rawle, 334 (13 Am. Dec. 678); *Crockett v. Lashbrook*, 5 T. B. Monroe, 530 (17 Am. Dec. 98); *Watson v. Gregg*, 10 Watts, 289 (36 Am. Dec. 176); 3 Washb. Real Property, top page 145.

The instruction informed the jury, in effect, that the occupancy of the land by the appellee and those under whom he claimed, as owners, for twenty years, or more, made his title good. The instruction was incomplete in not informing the jury that such occupancy, to have that effect, must have been continuous and uninterrupted. *Law v. Smith*, 4 Ind. 56; *Winslow v. Winslow*, 52 Ind. 8; 1 Works Pr., section 629. But the omission in the instruction, copied above, was supplied by other instructions given by the court upon the same subject. Thus, in the sixth instruction, given at the request of the appellee, the jury were told, in substance, that to constitute adverse possession so as to confer title, it should be continuous for twenty years. In the first instruction given at the request of the appellant, the jury were also informed, "that the true and correct dividing line between the land of

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the plaintiff and the land of the defendant is the half-section line, unless you find that the plaintiff and those under whom he claims title occupied a part of the land on the west side of said line adversely and under claim of right for more than twenty years continuously before the beginning of this suit."

Taking these instructions together, we are of opinion that they gave the jury the law correctly, and in such case the judgment will not be reversed, though a single instruction, standing alone, might be incomplete, in not containing all the qualifications or limitations upon the point of law attempted to be explained to the jury. *Eggleston v. Castle*, 42 Ind. 531; *Kirkland v. State*, 43 Ind. 146 (13 Am. R. 386); *Brooks v. Allen*, 62 Ind. 401.

The third instruction given at the appellee's request, and complained of by the appellant, was to the effect that a survey, without notice, and not made by the county surveyor, could not change lines nor bind the parties.

We think, under the evidence, this instruction was not erroneous.

The evidence showed that the land of the appellee, with other lands, belonged to his father at the time of his death; that afterwards there was a partition action between the heirs; and that the commissioners in making the partition ran a line, as the half-section line, a few feet east of the fence in controversy. Upon this point, the court in the fourth charge, given at the instance of the appellee, said to the jury, in substance, that the commissioners had no power or authority to fix the line between the lands of the appellant and appellee, or to change or establish a line between their lands.

We think, also, under the evidence, that this charge was not incorrect. The appellant was not a party to the partition action; his lands were in no way affected by it, and as he is not to be prejudiced, so he may not be benefited by any line run by the commissioners in making partition.

The instructions, taken altogether, were certainly as favorable to the appellant as he could have expected.

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 Axt v. Jackson School Township.
 

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The record appears to be free of any substantial error. We have examined it carefully and think the proper result was reached in the court below.

Judgment affirmed, at appellant's costs.

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 No. 10,512.

## AXT v. JACKSON SCHOOL TOWNSHIP.

SCHOOL TOWNSHIP.—*Orders or Certificates.—Acts or Promises of School Trustees.—Estoppel.*—Where the trustee of a school township has issued an order or certificate of indebtedness, in the name of his township, without any consideration therefor, such order or certificate is invalid and void, and can not be enforced against the township; nor, in such case, will the acts, conduct or promises of the trustee, or of his successors in office, estop the township from pleading the want of consideration, as a sufficient defence to any suit against it upon such order or certificate.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

W. R. Harrison and W. E. McCord, for appellee.

Howk, J.—On the 22d day of March, 1881, the appellant sued the appellee in the court below, in a complaint of two paragraphs. In the first paragraph he alleged, in substance, that in 1870 one Michael S. Arnold was the trustee of Jackson School Township, in Morgan county, and, as such trustee, contracted with one A. J. Demoss for lumber to construct a school-house in such township; that thereby the township, on September 23d and 30th, and October 8th, 1870, became and was indebted to said Demoss for the lumber so furnished, in the sum of \$315, and more; that, being so indebted, the said Arnold, as such trustee, as evidence of such indebtedness, executed and delivered to said Demoss four township orders or certificates, of the dates aforesaid, amounting in the aggregate to the sum of \$315, and severally assigned in writing to the appellant by endorsement thereon; that by their terms such

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Art v. Jackson School Township.

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orders or certificates were payable by appellee as soon as there might be funds on hand, and that, at various times since their execution, there had been funds on hand out of which to pay the same, and that each of the orders or certificates was then due and unpaid.

In the second paragraph of his complaint, the appellant sued upon the orders or certificates, described in the first paragraph, and, in addition to its averments, alleged, in substance, that during the years 1874, 1875 and 1876, the appellee, by its then trustee, requested appellant not to press the collection of such orders or certificates by suit, that appellee would pay the same as soon as it could raise the funds, and that it would make a special effort to accumulate funds to pay appellant's claim; that the appellant relied upon the promise of such trustee, and did not bring suit; that, during the years 1874 to 1877 inclusive, appellant was threatening and had determined to bring suit on such orders or certificates, and the appellee, by its then trustee, said to appellant that if he would not sue and harass appellee with a lawsuit, he, as such trustee, would pay such orders or certificates within a reasonable time thereafter; that appellant relied upon the promises of such trustee, and forbore to sue for more than four years, and a reasonable time had then elapsed, and that the orders or certificates were still due and unpaid, and that the lumber, for which they were given, was bought for and used in the construction of appellee's school-house. Wherefore, etc.

Appellee answered specially to the entire complaint, and to the first paragraph thereof in an additional paragraph of answer. Appellant's demurrers to each paragraph of answer, for the alleged insufficiency of the facts therein to constitute a defence to his action, were overruled by the court, and to each of these rulings he excepted. He then replied specially to appellee's answer, and to this reply appellee's demurrer, for the alleged want of facts, was sustained by the court. Appellant excepted to this ruling, and, refusing to reply further,

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Axt v. Jackson School Township.

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the answers were taken as true, and the court rendered judgment against him for appellee's costs.

The only error complained of in argument by the appellant's counsel is the overruling of the demurrer to the appellee's answer to the entire complaint. In this answer, the appellee admitted that Arnold, as its trustee, executed and issued the township orders or certificates set forth in the complaint; but it averred that such orders or certificates, and each of them, were issued and delivered to A. J. Demoss without any consideration whatever.

It is conceded by appellant's counsel, as we understand them, that this paragraph of answer states a good defence to the first paragraph of the complaint. But counsel claim that the paragraph of answer was bad on the demurrer thereto, because, while it purported on its face to be an answer to the entire complaint, it did not in fact answer all the material allegations of the second paragraph of the complaint. If the answer is open to this objection, the demurrer thereto ought to have been sustained; for there is no rule of pleading more firmly settled by the decisions of this court than this, that each paragraph of answer must fully answer the entire complaint, or so much thereof as it purports to answer, or it will be held bad on a demurrer thereto, for the want of sufficient facts. *Smith v. Little*, 67 Ind. 549; *Lash v. Rendell*, 72 Ind. 475; *Douch v. Bliss*, 80 Ind. 316.

In discussing this point, the appellant's counsel say that the second paragraph of complaint is not upon the township orders, "but upon the agreement to pay them if suit were not instituted, and, therefore, an answer of want of consideration as to the orders is not good as to this paragraph. The orders may have been without consideration, and yet if the appellee, by its agent, chose to pay them rather than go into court and fight them, or to agree to pay them at a future date rather than to go to the expense of litigating them, such an agreement, if accepted and acted upon by the owner of the orders, is binding, and the agreement to wait and not

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sue is a sufficient consideration for the promise on the part of appellee. If appellant was threatening to bring suit on the orders and to collect them of appellee, it had its choice to fight them and risk success, or to pay them so soon as it had funds on hand; and if it chose to pay, and, by an agreement to pay rather than stand a suit, induced appellant to forbear suit, it can not be heard to say now, when sued on the contract and agreement to pay, that the orders it agreed to pay are without consideration. Even if the court should find that the second paragraph is upon the orders, yet the appellee can not, over its agreement to pay, be heard to say there was no consideration for them in the beginning, unless all the principles of estoppel are violated."

This is the substance of the argument upon which the appellant's counsel rely for the reversal of the judgment below. They claim, that, although the township orders in suit were executed and issued without any consideration whatever therefor, yet the appellee became liable thereon, and was bound to pay the same, by reason of the promise of one of its trustees to pay, if the appellant would forbear to sue. This position, it seems to us, is wholly untenable. It will not do to say, we think, that the appellee is or could be estopped by anything said or done, or by any promise made, by any of its trustees, in relation to the payment of a claim which it did not owe. The trustee of a school township is something more than the agent of such township. He is a public officer, and his relations to his township are all of a fiduciary nature. In dealing with such trustee, the appellant was bound to take notice of his fiduciary character, and to know that he could only bind his township by his words and deeds, which were authorized by law. When the trustee of a school township issues an order or certificate of indebtedness in the name of his township, without any consideration whatever therefor, such order or certificate is invalid and void, and can not be enforced against such township. If the holder of such order or certificate forbear to sue the

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Hays v. Walker.

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township thereon upon the agreement of the trustee, or his successor in office, to pay the same at a future date, or as soon as it has the necessary funds on hand, such agreement will not bind the township, nor estop it from pleading the want of consideration, as a sufficient defence to any suit against it upon such order or certificate.

The second paragraph of appellant's complaint is founded upon the orders or certificates of indebtedness described therein. The appellee's answer is, that these orders or certificates were executed and issued without any consideration whatever therefor. This answer, if true, and the demurrer concedes its truth, saps and destroys the cause of action stated in the second paragraph of complaint, and is a complete defence, not only to the orders or certificates in suit, but also to the alleged agreement or promise of the trustee to pay the same.

We are of opinion, therefore, that the court committed no error in overruling the demurrer to appellee's answer to the entire complaint. We find no error in the record.

The judgment is affirmed, with costs.

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No. 10,587.

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## HAYS v. WALKER.

**SUPREME COURT.—Assignment of Errors.—Defect of Parties.**—A complaint can not be attacked on account of a defect of parties for the first time in the Supreme Court by a specification in the assignment of errors.

**SAME.—New Trial.**—An assignment of errors can not be made to serve the purposes of a motion for a new trial. Rulings admitting or excluding evidence are proper specifications in a motion for a new trial, but are not in an assignment of error.

**GUARDIAN AND WARD.—Conversion.—Interest.**—A ward who has attained his majority may either sue his guardian individually or upon his bond for a conversion of the ward's money received during the guardianship, and the highest rate of legal interest which the guardian could reasonably have obtained for the use of the money may be allowed.

From the Washington Circuit Court.

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Hays v. Walker.

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*H. Heffren* and *J. A. Zaring*, for appellant.

*J. Q. Voyles*, for appellee.

ELLIOTT, J.—The complaint is here attacked for the first time, and the attack is rested on the proposition that there is a defect of parties. The attack is without avail; no such question as that of defect of parties can be made for the first time by an assignment of errors.

The right of a ward, who has attained his majority, to maintain an action against his guardian for a wrongful conversion of money received during the guardianship, is clear. The ward may sue on the bond in the name of the State if he elects, but he is not bound to do so; he has his election either to proceed against the guardian individually for breach of duty, or to sue on the bond.

An assignment of errors can not be made to serve the purpose of a motion for a new trial. Stating in the assignment specific errors alleged to have occurred on the trial, will not bring them before this court for consideration. Rulings on the trial admitting or excluding evidence form proper specifications of the motion for a new trial, but are not proper specifications in the assignment of error.

The three reasons given in the motion for a new trial are: 1st. That the finding is contrary to the evidence. 2d. That it is contrary to law. 3d. That the damages are excessive.

Neither of these reasons presents any question upon the admission or exclusion of evidence.

There is evidence showing that appellant, while acting as guardian of appellee, converted the latter's money to his own use, and in law this fully warranted a finding for the ward. This is all that need be said upon the question presented by the first and second specifications of the motion for a new trial.

The guardian who converts to his own use money of his ward is chargeable with interest, and the court did not err in allowing the highest rate of legal interest which the guardian could have obtained by the use of reasonable diligence.

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 Logan v. Logan.
 

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There are coarse expressions in the brief of appellee's counsel which do him no credit. Counsel who abuse their adversaries instead of arguing their causes do their clients no good and themselves no honor. In the present instance, the language of counsel is such as merits severe censure and keen rebuke.

Judgment affirmed.

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No. 9608.

LOGAN v. LOGAN.

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141	807

**DIVORCE.—Alimony.—Support of Children.—Evidence.**—When a divorce is granted, the court has full authority to provide for the support of children, and, in determining the amount of such provision and of alimony, should consider not only the amount of the husband's present estate, but also his ability to make future earnings; and, in ascertaining his present estate, evidence of its extent shortly before the trial is proper.

From the Decatur Circuit Court.

*C. Ewing* and *J. K. Ewing*, for appellant.

*J. S. Scobey* and *D. Watts*, for appellee.

**ZOLLARS, J.**—In 1880, appellee filed her petition in the Decatur Circuit Court, praying a decree of divorce from appellant, the custody of their minor child, alimony in the sum of five hundred dollars, an allowance to enable her to prosecute the case, "and for all other proper relief." The petition charges abandonment and failure to support the petitioner and child since August, 1878, and the use of vile and abusive language of and concerning the petitioner. A decree of divorce was rendered in favor of appellee, with \$200 alimony, awarding to her the custody of the minor child until the further order of the court, with the right to appellant to visit and see the child, and ordering that appellant pay into court by the first day of January, 1881, \$50, and annually thereafter, for six years, a like amount, to be paid to ap-

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Logan v. Logan.

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pellee until the further order of the court, to be used for the support and maintenance of the child. It is claimed by appellant that the amount allowed as alimony is excessive, that the amount allowed for the support of the child is also excessive, and without authority of law, and that the court below erred in the admission of testimony offered by appellee upon these questions. He asks that this court order a modification of the decree, so that the amount allowed for the support of the child be cut off, and the alimony reduced, if not entirely cut off. He does not ask a reversal of the decree granting the divorce and awarding the custody of the child, unless that be necessary to accomplish the objects above stated. It appears from the evidence that the parties were married in the spring of 1876. After the marriage they lived in the family of appellant's father for some months, and then moved upon one of his farms, which appellant cultivated and was cultivating at the time of the separation, in August, 1878. Since the separation, appellee has lived in her father's family, and been supported by him. The child was born about six months after the separation. With the exception of a few months spent in Fort Wayne and Louisville, appellant has been living in his father's family.

The evidence on the part of appellee tends in some degree to show that at the time of the separation appellant was the owner of live-stock, farming implements, household goods, grain and growing crops, of value between \$500 and \$1,000; that after the separation he sold the same, mostly to his father, and at various times since has been in the possession of money of different amounts, ranging as high as \$175 at a time; that his net income for 1877 was \$1,000. He has been working upon his father's lands, but whether for wages or a part of the profits, or in what manner, is not apparent, except as an inference from all of the circumstances. Whether at the time the case was commenced, or tried, he was the owner of property of any value is not shown, except as may be inferred from the facts and circumstances given in evi-

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Logan v. Logan.

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dence. The testimony on the part of appellant is in conflict with that on the part of appellee as to the value of his property at the time of the separation, and tends to show that at the time of the trial he was not the owner of any property. At that time he was some over twenty-three years of age, and, for aught that appears, was a man of vigorous health and intellect.

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Upon the evidence in the record, we would not be justified in saying that the amount allowed to the wife, and for the support of the child, is excessive. It is the duty of the trial court, in each particular case, to consider all the facts and circumstances and situation of the parties, and exercise a judicial discretion as to the amount of such allowances.

This court can not interfere in such cases, unless it is clearly apparent that there has been an abuse of such discretion. Such has been the uniform ruling of this court, and it is supported by the law-writers and the adjudicated cases elsewhere. *Powell v. Powell*, 53 Ind. 513; *Buckles v. Buckles*, 81 Ind. 159; *Eastes v. Eastes*, 79 Ind. 363; *Musselman v. Musselman*, 44 Ind. 106, 123.

In fixing the amounts of alimony, and for the support of the child, the court must consider the amount of the husband's property, but this is not the sole consideration. It will not do to say that because the husband may have but little property, or none at all at the time of trial, no decree should be rendered for alimony or for the support of children. In many cases, he who has a strong right arm and vigorous intellect is, in fact, more wealthy than another with less health and mind, in the present possession of property; and, hence, the ability of the husband to earn money should be considered in fixing such allowances. 2 Bishop Mar. & Div., sections 446, 457.

It is insisted by appellant's counsel, that the testimony in relation to the amount of property owned by him should have been confined to the date of the beginning of the action, and that the court below erred in the admission of the testimony

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Logan v. Logan.

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of W. H. Stark, Jacob and Euphemia Rybolt, in relation to the amount and value of appellant's property at the time of the separation.

Objections were properly made to portions of the testimony of these witnesses upon this subject, but appellee was allowed to testify more in detail upon the same subject without objection. We do not think that there is available error in the admission of the testimony objected to. The amount of appellant's earnings per year, and his accumulations at the time of the separation, constitute a reasonably safe standard by which to judge of his ability to earn money. Such ability is to be considered in fixing the amount of alimony. Bishop Mar. & Div., sections 446 and 449.

The amount of appellant's property at that time was a proper subject of consideration, also, as tending to show his financial ability at the time of the litigation. It would hardly do to limit the wife in her proofs to the visible and tangible property of the husband at the time of trial or beginning of the action. If such an unbending rule were adopted, the wife, in many cases, could not hope for justice. The husband, after the *delictum*, in anticipation of litigation, might convert his property into money, stocks and securities, and so conceal them that it would be impossible to procure witnesses who could give any information upon the subject of the amount thus converted. See Bishop Mar. & Div., section 450.

Upon the trial below, over the objection of appellant, a witness was allowed to state that John Logan, the father of appellant, owned about 300 acres of land. He was asked the value, but appellant objected, and he was not allowed to answer. We think there is no available error in the admission of this testimony. The fact that the court excluded evidence of the value of the land shows that the alimony was in no way based upon any expectancy of appellant from his father's estate. The evidence shows that since the separation appellant has lived with his father, and been engaged in farming these

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Logan v. Logan.

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lands; whether as a hired man, tenant or partner, is left in doubt. But the fact that he was so engaged under such favorable circumstances tended, in some degree, to show that he was earning money.

It is insisted by counsel for appellant, that the court had no authority to make the allowance for the support of the child. In this counsel are clearly in error. The statute in explicit terms provides that the court in decreeing a divorce shall make provision for the custody and support of the minor children. Section 1046, R. S. 1881. This statute would seem to be plain enough without the citation of authorities, but see *Bush v. Bush*, 37 Ind. 164; *Eastes v. Eastes*, *supra*; *Musselman v. Musselman*, *supra*; *Cox v. Cox*, 25 Ind. 303; *Sullivan v. Learned*, 49 Ind. 252; Bishop Mar. & Div., sec. 466.

We are cited by counsel for appellant to the case of *Husband v. Husband*, 67 Ind. 583 (33 Am. R. 107). This case in no way conflicts with those above cited. It recognizes fully the power conferred by the statute and the doctrine of the other cases.

This was an action by the divorced wife against the divorced husband, to recover from him for the support of a child, whose custody had been awarded to her when the divorce was granted. It is held, simply, that having taken a decree for divorce and the custody of the child, without having obtained a provision for its support, she could not recover in the manner attempted.

It is further objected that the provision for the support of the child is not warranted under the prayer of the complaint. Under the statute upon the subject of such provision, the objection is clearly not well taken.

We have examined all of the objections argued and suggested by counsel, and find no error in the record for which the judgment should be reversed. It is therefore affirmed, at the costs of appellant.

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The State v. Cole.

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No. 11,162.

## THE STATE v. COLE.

CRIMINAL LAW.—*Malicious Trespass.—Statute Construed.*—The mere maliciously carrying away and conversion of the goods of another, without injury to the property itself by which its value is diminished, is not malicious trespass, as defined by section 1955, R. S. 1881.

From the Switzerland Circuit Court.

*F. T. Hord*, Attorney General, *E. G. Hay*, Prosecuting Attorney, and *T. Livings*, for the State.

NIBLACK, C. J.—In this case the only question presented is the sufficiency of an affidavit, and an information based upon it, assuming to charge the offence of malicious trespass, under section 1955 of the revised code of 1881.

Omitting the formal conclusion, the signature and the jurat, the affidavit was as follows:

“THE STATE OF INDIANA, SWITZERLAND COUNTY, ss:

“William P. Riley swears that James R. Cole, late of the county and State aforesaid, on or about the 8th day of December, A. D. 1882, did then and there, at and in said county, unlawfully and maliciously injure 21 bushels of wheat, of the value of \$21; 18 bushels of rye, of the value of \$6; and 15 bushels of oats, of the value of \$6; in all of the value of \$33; the property of the affiant William P. Riley there and being, by then and there unlawfully and maliciously taking said property out of the bin where affiant kept it, and by then and there taking said property a distance of 14 miles in said county and selling the same without right to James K. Pleasants for the sum of \$33, and delivering the said property to said Pleasants unlawfully and maliciously, to the damage of the said affiant in the sum of \$33.”

The court quashed both the affidavit and the information, upon the ground that the acts charged did not constitute a malicious trespass, within the meaning of the statute defining

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The State v. Cole.

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that offence, which reads as follows: "Whoever maliciously or mischievously injures or causes to be injured any property of another or any public property is guilty of a malicious trespass, and, upon conviction thereof, shall be fined not more than two-fold the value of the damage done, to which may be added imprisonment in the county jail for not more than twelve months."

The injuries against which this statute is directed are not such as are inflicted with the intention of gaining by another's loss; they are those which arise out of a spirit of wanton cruelty, malicious or mischievous destructiveness or revenge, and are of a class which have a near relation to the crime of arson. They are also such as result in a partial or total destruction of property, or in a specific injury to property, rendering it less valuable for the purpose for which it is designed or used. 1 Bishop Crim. Law, section 568; 2 Whart. Crim. Law, section 2001; Moore Crim. Law, section 990; Bishop Stat. Crimes, section 430, *et seq.*

The affidavit before us charged the mere carrying away and conversion of the property said to have been injured, presumably for the benefit of the defendant, and not necessarily out of malice towards the owner. It charged no specific injury to the property itself by which its value was diminished, and which could have been taken into consideration in fixing the amount of the fine. It was, in our estimation, materially defective.

There was, therefore, no error in quashing the affidavit, or the information which followed it in the description of the alleged offence. *Brown v. State*, 76 Ind. 85.

The judgment is affirmed.

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State, *ex rel.* Board of Commissioners of Scott County, *v.* Wilson *et al.*

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No. 10,856.

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150 83

STATE, EX REL. BOARD OF COMMISSIONERS OF SCOTT  
COUNTY, *v.* WILSON ET AL.

**JURY.**—*Evidence.—Admissions.*—Where there is no impeaching or contradictory evidence, and the admissions testified to are corroborated by the other testimony in the case, the jury have no right to arbitrarily disregard them.

**SAME.**—*Amount of Recovery.*—Where a *prima facie* case, entitling plaintiff to recover a much larger sum than that allowed, is shown, and no contradictory evidence is offered, the jury should base the amount of recovery upon the case thus made.

From the Washington Circuit Court.

*W. K. Marshall* and *W. Trulock*, for appellant.

*C. L. Jewett*, for appellees.

**ELLIOTT, J.**—It is contended by appellant that the amount awarded by the verdict and judgment is too small, and that for this reason the motion for a new trial should have been sustained. We have carefully read the evidence, and it seems clear to us that the appellant is right.

Where admissions are clearly proved and are consistent with the other evidence and circumstances of the case, they should be acted upon by the jury, unless in some way disproved or contradicted; where there is no impeaching or contradictory evidence, and the admissions testified to are corroborated by the other testimony in the case, the jury have no right to arbitrarily disregard them. In the present instance, the admissions of the principal debtor clearly show a liability for a much greater sum than that awarded, and all the evidence tends to support the admission. A *prima facie* case, entitling the appellant to recover a much larger sum than that allowed was clearly and fully made out, and as there was no evidence tending to disprove this *prima facie* case, the jury should have based its assessment of the amount of recovery upon the case thus made out.

The appellees were the sureties on the bonds executed by

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The Warrick Building and Loan Association v. Hougland.

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Newton M. Wilson, as clerk of Scott county, and were liable for all money of the relators received by him in his official capacity, and the uncontradicted evidence shows him to have received a larger sum than that awarded by the verdict to the relators. The evidence given on the part of the plaintiff was uncontradicted, for no evidence was offered by appellees except the commission of their principal.

Judgment reversed.

Petition for a rehearing overruled.

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No. 10,540.

THE WARRICK BUILDING AND LOAN ASSOCIATION  
v. HOUGLAND.

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149 553

**AGREED CASE.—Practice.—Supreme Court.**—An agreed case, under section 553, R. S. 1881, does not require any pleadings, and, if pleadings be filed, they should be disregarded; nor can any question be made upon them in the Supreme Court.

**SAME.—Exceptions.—Assignment of Error.**—In such case, exception to the decision of the court below shown by the record, and an assignment of error upon such decision, will present the case to the Supreme Court.

**SAME.—Presumption.**—In such case, the Supreme Court will decide for itself upon the agreed statement of facts, and will not indulge presumptions in support of the judgment of the trial court, as in other cases.

**SAME.—Building and Loan Associations.—Borrower.—Stock.**—An agreed statement of facts which shows the date at which a member of a building and loan association not in arrears paid his loan, before maturity, but does not show when the association was organized, or when the series of stock on which the loan was made was issued, presents no question as to the amount of premium which should be refunded to him under the act of 1877, Acts 1877, p. 7.

From the Warrick Circuit Court.

C. W. Armstrong and J. B. Cockrum, for appellant.

E. Gough, for appellee.

BLACK, C.—The appellee filed in the court below a complaint against the appellant, and at the same time filed an

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The Warrick Building and Loan Association v. Hougland.

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agreed statement of facts, entitled like the complaint, and accompanied by an affidavit "that the controversy is real in this action and the proceedings in good faith."

The record states that the cause was submitted to the court upon the agreed statement of facts, and that the court, having heard the argument of counsel and being sufficiently advised in the premises, found for the plaintiff, and assessed his damages at \$31.60; and thereupon judgment was rendered against the defendant for said sum, to which judgment the defendant excepted.

The appellant has assigned as errors:

*First.* That the facts as set out in the complaint of the appellee and as set out in the record are not sufficient to constitute a cause of action against the appellant.

*Second.* That the facts as agreed upon by the appellant and appellee in the court below, and as set out in the record, are not sufficient to support the judgment against the appellant.

*Third.* That the facts as averred in the complaint, and as agreed to in the statement of facts as set out in the record, are not sufficient to support the judgment against the appellant or to constitute a cause of action in favor of the appellee against the appellant.

*Fourth.* That the court erred in its conclusions of law upon the facts as submitted upon the agreed statement of the appellee and the appellant, and as set out in the record.

The proceeding was an agreed case under section 553, R. S. 1881. In such a case, no pleadings are contemplated by the statute. *Sharpe v. Sharpe*, 27 Ind. 507. It is intended that the agreed statement of facts shall serve the purpose of all the pleadings used in an ordinary action to evolve an issue for trial. It is to be considered as showing the facts of the controversy, though they should constitute a different cause of action in favor of the plaintiff from that shown by an accompanying complaint. *Manchester v. Dodge*, 57 Ind. 584.

No complaint was necessary to inform the defendant as to the plaintiff's claim, or to inform the court as to the question

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The Warrick Building and Loan Association v. Hougland.

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to be tried. The record expressly shows that the cause was submitted upon the agreed statement. Upon that alone, as was proper, the decision was based.

The complaint performed no office in the cause, and its insufficiency could not affect the case, and can not be assigned here as error.

In such a case, there must be an exception to the decision of the court upon the agreed statement of facts, in order to reserve any question for this court. *Fisher v. Purdue*, 48 Ind. 323; *Lofton v. Moore*, 83 Ind. 112.

Upon appeal, the decision of the trial court upon the agreed statement of facts must in some form be assigned as error.

The agreed facts were stated as follows:

"1st. That one Park White was the owner of one share of said association's stock.

"2d. That he borrowed said share, \$200, and paid for the privilege of the loan a premium of \$47.

"3d. That he repaid his loan on the 5th day of April, 1881, when the association refunded to him one-sixth of the premium.

"4th. That said White assigned to said George Hougland, in writing, his claim against said association for balance of premium, amounting to \$31.60.

"5th. It is also agreed that the prevailing party shall recover costs, though the recovery shall be less than \$50.

"6th. That said Park White was not in arrears for dues, interest, fines or assessments at the time of the repayment of said loan."

Where a cause appealed to this court was tried upon an agreed statement of facts, this court, having the same means of arriving at a decision that was had by the trial court, will not indulge the presumptions which are indulged in favor of the decision of the trial court upon oral evidence, but will weigh the statement as if it were trying the case originally. *Indignapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402; *Hannum v. State*, 38 Ind. 32.

The fourth clause of the statement of facts is treated, not

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The Warrick Building and Loan Association v. Hougland.

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as an agreement that there was a balance of premium amounting to \$31.60, but as an agreement that White assigned to the appellee a claim for such a balance. No other construction is suggested.

The statute by which the balance of premium to which White was entitled was determined was the act of March 3d, 1877, Acts 1877, p. 7, which provided: "That a borrower, who is not in arrears for dues, interest, fines, or assessments, may repay a loan at any time, by refunding the amount of money borrowed; and in case of the repayment thereof, before the expiration of the sixth year after the organization of the corporation, there shall be refunded to such borrower the full amount of his or her stock, including the premium or discount paid, less one-sixth of said premium or discount for every year of said six years then unexpired, and said payment, thus made, shall be a full and complete discharge of both the original stock and debt, and no new stock shall be issued therefor; but the officers of said association shall enter satisfaction of such payment of record: *Provided*, That when the stock is issued in separate series, the time shall be computed from the date of the issuing of the series of stock upon which the loan was made."

It is evident that whatever construction should be placed upon this statute as to the amount of premium that should be refunded in a given case, a statement of facts which shows the repayment of a loan and the refunding to the borrower of one-sixth of the premium, and does not show the relative time of the repayment, does not establish a claim, for a return of an additional amount of premium or call for a construction of the statute. The facts do not show that, under any construction that might be claimed for the statute, any more premium was due to White.

Counsel have disputed as to the proper construction of the statute in a case of repayment of the loan five years before the expiration of the sixth year after the organization of the

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Hendrix v. Rieman *et al.*

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corporation, but the facts stated do not raise such a question, and do not show a right to the recovery of any sum.

The judgment should be reversed.

**PER CURIAM.**—It is ordered, upon the foregoing opinion, that the judgment be reversed, at appellee's costs, and the cause is remanded, with instructions to render judgment for the defendant.

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No. 8846.

**HENDRIX v. RIEMAN ET AL.**

**SUPREME COURT.**—*Bill of Exceptions.*—*Evidence.*—Where the evidence is necessary to the determination of a cause, and the bill of exceptions purports to, but does not, include it, no question is presented to the Supreme Court.

From the Allen Circuit Court.

*L. P. Milligan* and *A. Moore*, for appellant.

*R. S. Taylor*, for appellees.

**FRANKLIN, C.**—In this case it is insisted by appellees' counsel that the record is not in a condition to present any question for the consideration and decision of this court. Upon examination, we find that to be true.

The assignment of errors is not signed by any person.

The bill of exceptions, in the conclusion, purports to contain all the evidence given in the cause, but shows upon its face that it does not do so. All the questions attempted to be raised are dependent upon the evidence, and as that is not in the record, these questions could not be considered, had the alleged errors been properly signed. No question is properly presented for our decision by the record.

The judgment ought to be affirmed.

**PER CURIAM.**—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is in all things affirmed, with costs.

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Farnsley *et al.* v. The Anderson Foundry and Machine Works.

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No. 8812.

FARNSELEY ET AL. v. THE ANDERSON FOUNDRY AND  
MACHINE WORKS.

CHATTEL MORTGAGE.—*Foreclosure.*—*Parties.*—In a suit to foreclose a chattel mortgage, the mortgagor, having sold the chattel and having no interest therein, is not a necessary party defendant.

PAYMENT.—*Collateral Security.*—*Pleading.*—Where a creditor, holding a claim as collateral security, collects it and applies the proceeds to his own use, it is a payment *pro tanto*, and the fact may be shown under an answer alleging payment.

From the Pulaski Circuit Court.

*G. Burson, S. Claypool and W. A. Ketcham*, for appellants.  
*W. Spangler and T. S. Rollins*, for appellee.

NIBLACK, C. J.—On the 10th day of February, 1877, Thomas C. McQuitty and Celina, his wife, in conjunction with John L. Ogle and George A. Zeek, executed to the Anderson Foundry and Machine Works, of Anderson, in this State, a chattel mortgage on a steam engine, boiler, fixtures, and other accompanying articles of personal property, to secure, amongst other things, the payment of a promissory note made by the mortgagors for the sum of \$436.86, payable twelve months after the date of the mortgage. The mortgage was duly recorded in the county of Pulaski, in which the mortgagors resided, and in which the property was situate. Afterwards the mortgagors sold and transferred the mortgaged property to one James Farris, who soon thereafter sold and delivered it to James Farnsley and Frank Slocum.

This was a suit by the Anderson Foundry and Machine Works against Farnsley and Slocum to foreclose the mortgage, alleging the non-payment of the note, to which reference is made as above. The defendants demurred to the complaint upon the ground that the mortgagors ought to have been made co-defendants with them in the action, but the demurrer was overruled.

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Farnsley *et al.* v. The Anderson Foundry and Machine Works.

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The defendants answered in six paragraphs. The second and third paragraphs were both, but in different forms, general pleas of payment.

The fifth paragraph averred that the makers of the note and mortgage, after they had been executed, placed in the hands of the mortgagee other notes as collateral security for the payment of the note in suit, and other notes secured by the same mortgage, and that the mortgagee had collected upon the notes so left as collateral security, and appropriated to his own use, \$200 more than enough to satisfy the other notes named in the mortgage, and that said sum of \$200 ought to be set off against, and deducted from, the note set out in the complaint.

A demurrer was sustained to this fifth paragraph of the answer, and, issue being joined, the court found that there was due upon the note the sum of \$521.74, and, over a motion for a new trial, decreed a foreclosure of the mortgage.

The mortgagors were proper, but not necessary, co-parties with Farnsley and Slocum, inasmuch as they had no remaining interest in the mortgaged property, and as no personal judgment was demanded upon the note. *Stevens v. Campbell*, 21 Ind. 471; *Scarry v. Eldridge*, 63 Ind. 44.

The fifth paragraph of the answer was, in its essential averments, a plea of partial payment. The facts set up by it were, therefore, provable under both the second and third paragraphs, alleging full payment, and upon which issue was joined. We need not, consequently, inquire whether this fifth paragraph was well pleaded, as, in any event, no substantial injury was done to the appellants by the decision of the court sustaining the demurrer to it. 1 Works Pr., section 537; 1 Ripley's Digest, p. 585; *Whiteman v. Harriman*, 85 Ind. 49.

The bill of exceptions, copied into the transcript, contains evidence purporting to have been adduced at the trial, but it does not state, either directly or inferentially, that the evi-

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Foster *et al.* v. Paxton.

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dence which it contains is all that was given in the cause. For this reason there is no proper question before us as to the sufficiency of the evidence to sustain the finding of the circuit court. *Brickley v. Weghorn*, 71 Ind. 497; *Brock v. State, ex rel.*, 85 Ind. 397.

The judgment is affirmed, with costs.

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No. 9383.

## FOSTER ET AL. v. PAXTON.

**DRAINAGE.—Ditch Assessment.—Jurisdiction.—Collateral Attack.**—When a petition for the location of a ditch is sufficient to give the county board jurisdiction of the subject-matter, an assessment thereunder can not be collaterally attacked for mere irregularities, the remedy therefor being by an appeal from the order of the board.

From the Lake Circuit Court.

*E. Griffin* and — *Griffin*, for appellants.

*J. W. Youche*, for appellee.

**ELLIOTT, J.**—The complaint of appellants was held bad on demurrer, and of this ruling they here complain. The pleading is founded upon a ditching assessment made under the act of 1867, and sets out the proceedings in full. We have no brief from the appellee, and are unable to discover any valid objection to the complaint. The petition filed before the commissioners was sufficient to give the board jurisdiction of the subject-matter, and the remedy of the appellee for mere irregularities was by appeal, as expressly provided in section 11 of the act. *Featherston v. Small*, 77 Ind. 143; *Marshall v. Gill*, 77 Ind. 402.

Judgment reversed.

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The State, *ex rel.* Bode, *v.* Sherman, School Trustee.

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No. 10,673.

THE STATE, EX REL. BODE, *v.* SHERMAN, SCHOOL  
TRUSTEE.

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149	354
90	123
164	387

**SCHOOLS.—School-Houses.—Township Trustee.—Mandate.—County Superintendent.**—A school trustee has no lawful authority to provide furniture for a room for school purposes, or employ teachers for service therein, unless such room is owned or leased by the school township, and even if the county superintendent, on appeal, direct him to do so, he may properly disobey the order, and mandate will not lie to compel him to obey it.

**SAME.—Abolishing School Districts.**—After a school trustee has, on appeal, been ordered by the county superintendent to provide furniture for the school-house of a district, he may at once abolish the district and provide proper school facilities for the people thereof in other districts, and then disregard the order of the superintendent.

From the Noble Circuit Court.

*H. G. Zimmerman* and *T. M. Eells*, for appellant.

*J. H. Baker*, *J. A. S. Mitchell* and *L. W. Welcker*, for appellee.

**HAMMOND, J.**—The legal voters who were patrons of school district No. 16, in Allen township, Noble county, held a school meeting on August 5th, 1882, at which the appellant's relator presided as director of the school district. At this meeting the following proceedings were had: "On motion of Fred Kreinbrink, it was resolved that this meeting hereby petition the trustee of the township for an additional teacher. On motion of Fred Bork, it was resolved that this meeting hereby petition the trustee of the township to furnish a full set of seats and desks for two rooms for the school-house, the same to cost about \$5 each, or, in the aggregate, \$300. On motion of Fred Kreinbrink, it was resolved that the meeting petition the trustee of the township to take action on the two preceding resolutions as soon as possible, and before the next term of school commences."

These proceedings were duly certified to the appellee as school trustee of the township. He declined to comply with

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The State, *ex rel.* Bode, v. Sherman, School Trustee.

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the requests of the meeting. An appeal was taken from his decision to the county superintendent. The latter reversed the decision of the trustee, and directed him to furnish the seats and employ the additional teacher as requested by the meeting. The appellant's complaint in this case was then filed by way of mandate to require the appellee, as school township trustee, "to furnish a full set of seats and desks for two of the rooms in said building, and to employ additional and sufficient teachers for said school 16."

It was averred in the complaint that the trustee had refused to obey or carry into effect the decision of the county superintendent.

In return to the alternative writ of mandate which was issued, the appellee answered, substantially, as follows: That the school-building in question and the real estate whereon it was situated, belonged not to the township, but was the private property of an individual, who had absolute control over it, and who had not leased it to the township, nor authorized the township to use it for public school purposes; that the township had no legal right to occupy it for school purposes or otherwise, and that the appellee had no right whatever to take possession of it; that said building was occupied and used as a private residence and for a private school; that for about three years last past, by the license and permission of the owner of the building and the persons having control of it, the same had been at certain times used for common school purposes by said school township, the last use thereof for such purposes being in June, 1882, but that the township at no time had a lease or contract for the possession of said building, and that such use by the township was merely by sufferance of the owner; that said school district number 16 never had a school-building, owned or leased by the township; that before the appellee rendered his aforesaid decision refusing to furnish seats for, or to employ a teacher in, said building, he had been petitioned by a large number of citizens and taxpayers of said school township, who had children of the proper age to attend

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The State, *ex rel.* Bode, v. Sherman, School Trustee.

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school, to establish a graded school in conjunction with the corporation of the town of Avilla, which is located in said township, but constitutes a separate municipal corporation therefrom; that, after receiving this petition, he gave his decision refusing compliance with the requests made at said school meeting, but did, on the day following the decision of the county superintendent, in conjunction with the school trustees of said town of Avilla, establish joint graded schools, locating the same in said town; that suitable and sufficient school-buildings have been procured and properly seated, and a sufficient number of duly licensed and competent teachers employed to give instruction to all pupils desiring and entitled to admission to said graded schools; that the buildings so provided are about sixty rods from the building in controversy, and convenient to all the pupils who have been accustomed to attend school thereat; that, at the same time of establishing said graded schools, the appellee, as such school trustee, abolished school district No. 16, and that he has made ample preparations to accommodate all the school children of said old district No. 16 at said graded schools, and at schools numbered 6 and 12, which are averred to be more convenient to them than the building in controversy in this case.

The appellant's demurrer was overruled to the appellee's answer, and an exception taken. The appellant replied by a general denial. The case was tried by the court, and, at the request of the parties, there was a special finding of the facts, with conclusions of law thereon. The facts, found specially by the court, were in all substantial respects the same as as those set up in the appellee's answer, and the conclusions of law were in favor of the appellee. To these the appellant excepted. The errors assigned in this court are the conclusions of law on the facts found by the court, and the overruling of the demurrer to the appellee's answer. As the appellee did not move for a new trial and bring before us the evidence upon which the court made its finding of facts, they are presumed to be correct.

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The State, *ex rel.* Bode, *v.* Sherman, School Trustee.

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We are of the opinion that there is no error in the record of which the appellant can complain. As the complaint did not allege that the building in which it was sought to have the appellee provide seats and employ teachers was owned by the township, nor in any way under the control of the school trustee, we are of opinion that it stated no cause of action. The answer of the appellee and the findings of the court show affirmatively that such building belonged to an individual, and not to the township, and that the trustee had no control over it.

It is the duty of the trustee of the township to take charge of the educational affairs of his township, to employ teachers, establish and locate conveniently a sufficient number of schools, to build or otherwise provide suitable houses, furniture, apparatus, and other articles and educational appliances necessary for the thorough organization and efficient management of the schools. Section 4444, R. S. 1881. Under section 4499, the voters may hold school meetings, and may, *inter alia*, "direct such repairs as they deem necessary in their school-house." Under section 4537, an appeal lies from the decisions of township trustees to the county superintendents, "and their decisions of all local questions relating to the legality of school meetings, establishment of schools, and the location, building, repair, or removal of school-houses, \* \* \* \* shall be final." The school-houses here referred to are the public school-houses of the township. The statute has no reference to private school-buildings, nor to private buildings of any kind not leased to the township for common school purposes. It is only in the public school-house of their school district that the legal voters may direct repairs to be made. If they direct them to be made elsewhere, they act beyond the scope of their authority. The trustee has no right to obey; and, if upon appeal from his decision refusing to make the repairs, it is reversed by the county superintendent, the latter acts beyond the scope of his authority, and his decision is a nullity. The same may be said with

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reference to any furniture or school apparatus, or the employment of any teacher for a building which is not a public school-house, owned by the township or controlled by the school trustee. A different view from this would lead to consequences inimical to the best interests of the common schools. The public school funds, if the appellant's theory of the law is correct, could be diverted from their legitimate purposes to improve private property or to maintain, or assist in maintaining private schools.

This would be a violation not only of the spirit but of the very letter of the school law, and is a construction that would do violence to the manifest purposes of the laws establishing public schools. If seats and repairs can be placed in and upon private property with funds collected from the taxpayers for school purposes, then a school-house may be erected with school funds upon real estate not owned by the township. But in *Koontz v. State, ex rel.*, 44 Ind. 323, it was decided that a trustee can not by mandate be required to locate and build a school-house on land that does not belong to the township, notwithstanding the county examiner, on appeal from the trustee's decision, has rendered a decision requiring him to erect a school-house on such land.

Moreover, as it was expressly decided in *State, ex rel., v. Mewhinney*, 67 Ind. 397, if the building in question had been a public school-building, the decision of the county superintendent would not have prevented the trustee from changing the school from that to another location, if he made proper provision for the educational wants of the school children affected by such change.

We think that the trustee had authority, under the law, to abolish district No. 16, and to make provision for the children therein in the graded schools and in the schools in districts 6 and 12, especially as it is averred in the appellee's answer, and found as a fact by the court, that such arrangements afforded proper educational facilities for the school children who, prior thereto, had been attached to said school 16.

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The Estate of Thomas v. Service.

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We think the court below did not err in overruling appellant's demurrer to the appellee's answer, nor in its conclusions of law from the facts as found.

Judgment affirmed, at the costs of the appellant's relator.

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126	545
90	128
126	130

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No. 10,111.

THE ESTATE OF THOMAS v. SERVICE.

SUPREME COURT.—*Practice.—Assignment of Error.*—If the assignment of errors do not contain the full names of the parties, the appeal may be dismissed on motion made in apt time, and if it can not be found from the whole record who the parties are, the Supreme Court will, of its own motion, strike the case from the docket.

From the LaPorte Circuit Court.

*J. A. Love* and *E. G. Thomas*, for appellant.

*L. A. Cole* and *C. H. Wilson*, for appellee.

BLACK, C.—The appellee has moved to dismiss this appeal, for the reason that the assignment of errors does not conform to Rule 1 of this court, which requires that "The assignment of errors shall contain the full names of the parties," etc.

For names of parties, this assignment contains the following: "*In the Matter of the Claim of George Service v. The Estate of William Thomas.*"

"The appellant, the Estate of William Thomas, deceased, for assignment of errors in said cause, says," etc.

Under former decisions of this court, this is not a compliance with the rule. *Estate of Peden v. Noland*, 45 Ind. 354; *State, ex rel., v. Delano*, 34 Ind. 52; *Louisville, etc., R. W. Co. v. Head*, 71 Ind. 176; *Kiley v. Perrin*, 69 Ind. 387; *Henderson v. Halliday*, 10 Ind. 24.

The appeal should be dismissed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the appeal be dismissed.

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The Estate of Thomas v. Service.

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## ON PETITION FOR A REHEARING.

BLACK, C.—It is admitted that the assignment of errors should contain the full names of the administrators, but it is claimed that the defect in the assignment was waived by the appellee by the filing of his agreement to submit the cause before his motion for the dismissal of the appeal. But upon a careful examination of the entire record it can not be discovered that the appeal was taken by administrators, or that there are any administrators of the estate of William Thomas, deceased.

It would not be profitable to take space to show particularly the condition of the record, which is peculiarly bad.

The cause was prosecuted against the estate of William Thomas, deceased, and the judgment was that the claimant recover "from the assets of said estate." It was stated in a paragraph of the answer, that the estate had been settled, and that the administrators, not named, had been discharged less than thirty days after the filing of this claim. In the testimony of one E. G. Thomas, he said: "I *was* one of the administrators of the estate of William Thomas, deceased." Nothing constituting part of the record shows who had been the other administrator or administrators. The record shows that "said estate, by counsel," prayed an appeal to this court. An appeal bond was filed, signed by E. G. Thomas and Lucretia Thomas. The judgment is therein referred to as a "judgment against the estate of William Thomas," and it is said therein that "E. G. Thomas has appealed therefrom to the Supreme Court," etc.

It would seem that there was a final settlement of the estate of William Thomas, deceased, and that the administrators thereof were discharged without any disposition of this claim, and the final settlement had not been set aside, and there was no administrator when judgment on the claim was rendered. We can not discover that a judgment was rendered against

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Floyd *et al.* v. Floyd *et al.*


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any person either as an individual or in a representative capacity.

In the absence of any motion, without regard to the fact that the appellee had submitted the cause, this court would be compelled to order that the cause be struck from its docket. The same result was accomplished by sustaining the motion to dismiss.

PER CURIAM.—The petition for a rehearing is overruled.

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No. 9842.

FLOYD ET AL. v. FLOYD ET AL.

WILL.—*Contest of.—Statute of Limitation.—Complaint.—Amendment.—Parties.*

—Where new parties are brought in by amendment of the complaint, and such amendment involves any question as to the statute of limitations, such action, as to such parties, as a general rule, is deemed to be commenced at the time such amendment is made; but this rule does not apply where no judgment can be rendered till all the parties are before the court, and, hence, where an action to contest a will is brought within three years from its probate against some of the persons beneficially interested therein, and others are made parties by amendment of the complaint after three years, such action is deemed commenced against all the parties from the time the complaint was filed, and is not barred as to any of them.

SAME.—*Legatee.—Estoppel.*—In an action by several persons to contest a will, an answer that one of such persons is a legatee, and that he has received and retains his legacy is insufficient, as the action is not joint, but is a proceeding *in rem*, where the interests of the parties are several, and though one may have estopped himself to maintain the proceeding, this fact does not preclude the others who have united with him in such proceeding.

SAME.—*Amendment of Record.—Practice.*—An objection to the complaint, upon the ground that it appears to have been filed more than three years after the will is alleged to have been probated, is removed by an amendment of the record showing that the original complaint was filed within three years from such probate.

From the Shelby Circuit Court.

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*Floyd et al. v. Floyd et al.*

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*T. A. Hendricks, T. B. Adams and L. T. Michener*, for appellants.

*B. F. Love, J. F. Vaile and H. C. Morrison*, for appellees.

BEST, C.—The appellants Arthur W. Floyd, William M. Bone, Eliza E. Thompson, Jasper Blankenbecker and Elizabeth A. Snyder brought this action against Erastus L. Floyd, Jemima Bishop and others, to contest an instrument as the will of Matthias Floyd, deceased, on the ground of fraud, undue influence, and that the testator was of unsound mind. Afterwards an amended complaint was filed, making Alexander Bishop, Arminta Bishop, William Bishop and Laura Bishop defendants.

An answer of nine paragraphs was filed, to all of which except the seventh and eighth a demurrer was sustained. The seventh was withdrawn and a demurrer was overruled to the eighth. The appellants declining to reply, final judgment was rendered against them. The ruling upon the demurrer to the eighth paragraph of the answer is assigned as error by the appellants, and cross errors are assigned by the appellees upon the ruling upon the demurrer to the other paragraphs.

The eighth paragraph averred that the will of Matthias Floyd, deceased, was probated in Shelby county, in this State, on the 16th day of October, 1877; that the original complaint was filed on the 29th day of July, 1880, naming Jemima Bishop as a defendant, but that said Jemima Bishop departed this life intestate on the 1st day of May, 1879, leaving as her only heirs at law her husband, Alexander Bishop, and her children, Arminta, William and Laura Bishop; that at the time of filing said complaint the said Alexander Bishop and said children were, and still are, beneficially interested in the will of said testator; that as to said Alexander, Arminta, William and Laura Bishop, this action was not commenced till the 18th of October, 1880, more than three years after said will was probated, and by reason thereof the plaintiffs' cause of action is barred as to all the defendants.

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The substance of this paragraph is, that while the suit was commenced within three years after the will was probated, the amended complaint, making Alexander Bishop and his children, Arminta, William and Laura Bishop, parties, was not filed until after that time.

The statute, under which this proceeding was instituted, provides that "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity, or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto." R. S. 1881, sec. 2596.

This statute authorizes the institution of a suit to contest the validity of a will at any time within three years after it has been offered for probate, and requires all persons beneficially interested therein to be made defendants thereto. This action was commenced within the time limited against some of the appellees, but Alexander Bishop and his children were not made parties until the amended complaint was filed, and as this was not done until after the time limited, the question arises whether the action is to be deemed commenced against these parties from the time the amended complaint was filed or from the time the action was commenced. Generally speaking, an amendment to a complaint has relation to the time the complaint was filed. This, however, is not the case where the amendment involves a question as to the statute of limitations. In such case, as a general rule, the action is deemed commenced from the time the amendment is made. *Lagow v. Neilson*, 10 Ind. 183; *Jones v. Porter*, 23 Ind. 66; *Hawthorn v. State, ex rel.*, 57 Ind. 286.

This is the rule in all cases where several judgments may

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be rendered, and it may apply in some others that do not now occur to us. It does not, however, apply to a case where no judgment at all can be rendered until all persons beneficially interested, as in this case, are before the court. In such case, the action must be deemed commenced against all from the time it was originally instituted; otherwise an action, commenced within the statutory period, will be deemed barred simply because all persons who are necessary parties were not then made defendants. In such case the action is saved or barred as to all the parties, and as the law favors the right of action, rather than the right of limitation, the action will not be deemed barred as to any of them.

This precise question has not heretofore arisen in this State, but we find it decided in *Bradford v. Andrews*, 20 Ohio St. 208 (5 Am. R. 645), and as the reasoning of the court is quite satisfactory, we make an extended extract from the opinion. The court said: "Where a petition for such a contest is filed within the statutory period of limitation, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired. If any person interested appears, and in good faith files his petition for a contest, the statutes entitle him to a trial, and the verdict of a jury, touching the validity of the will; and that verdict will be binding upon all parties who may be before the court as such, at the time of its rendition. The interest of the parties is joint and inseparable. Substantially this is a proceeding *in rem*, and the court can not take jurisdiction of the subject-matter by fractions. The will is indivisible, and the verdict of the jury either establishes it as a whole, or wholly sets it aside. To save the right of action therefore to one is necessarily to give it to all. The case belongs to that class of actions where the law is compelled either to hold the rights of all parties in interest to be saved, or all to be barred. And it seems now to be quite well settled law, that the preference

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will in such cases be given to the right of action, and not to the right of limitation. The right to sue is a favored right, and is guaranteed by constitutional provision, while the right of limitation generally meets with more or less disfavor."

This extract, we think, expresses accurately the law upon this question, and it, therefore, follows that the court erred in overruling the demurrer to the eighth paragraph of the answer.

This conclusion renders it necessary to examine the cross assignment of errors.

The first one noticed in the appellees' brief is that the court erred in sustaining a demurrer to the fourth paragraph of the answer. This paragraph averred in substance, that William J. Floyd, one of the plaintiffs, was a legatee under such will, and that before the commencement of the proceedings he had received from the executor of the estate \$1,000, the full amount of such legacy, in payment of the same.

The reception and retention of this money, it may be conceded, estop such legatee from contesting the will, but it does not therefore follow that his co-parties are likewise precluded. The appellees insist that since the plaintiffs below united in an application to set aside the will, the cause of action must be deemed joint, and in order to enable any of them to succeed all must be able to do so. We think otherwise. The cause of action was not joint, nor were the interests of the parties joint, but several. Any one of them might institute the proceeding, though the others refused to join, and the fact that one had estopped himself from contesting the will constituted no defence to a contest by the others. Nor does the fact that one thus estopped unites with others not estopped, prevent them from contesting the will. The proceeding is not to enforce a joint claim, nor to procure a joint recovery, but it is a proceeding *in rem*, instituted by persons having several interests, in which, if any succeed, the judgment inures to the benefit of all. This court, in *Leach v. Prebster*, 39 Ind. 492, in a similar case, held that proof of

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such answer constituted no defence. In that case, the widow united with the mother of a decedent in contesting a will, and as the widow had received property under the will, it was insisted that this fact constituted a bar to the action. The court, however, held otherwise, saying that if the widow was estopped it would not prevent the will from being set aside, as the proceeding was also instituted by the mother, and the judgment would inure to the benefit of all. If proof of the fact would constitute no defence, of course no error was committed in sustaining the demurrer to the answer.

The ninth paragraph of the answer alleged, in substance, that William Bone, one of the plaintiffs, to whom eighty acres of land had been devised by the testator, had sold and conveyed the same before this proceeding was instituted. The facts averred in this paragraph only tended to show that he alone was estopped to maintain the proceeding, and, for the reasons already given, the demurrer to it was properly sustained.

No different question was raised by the ruling upon the remaining paragraphs of the answer, to which the demurrer was sustained, and they need not be noticed more particularly.

The appellees insist in their brief that the complaint is bad because it appears to have been filed more than three years after it is averred that the will was admitted to probate. Since this objection was made, it has been obviated by an amendment of the record, showing that the original complaint was filed less than three years after the will is alleged to have been probated. There is, therefore, nothing in this objection. This disposes of the cross assignments of error.

For the error in overruling the demurrer to the eighth paragraph of the answer, the judgment should be reversed.

PER CURIAM.—It is therefore ordered that the judgment be reversed, at the appellees' costs, with instructions to sustain the demurrer to the eighth paragraph of the answer and for further proceedings.

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Shuey, Administrator, v. Latta.

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No. 10,660.

## SHUEY, ADMINISTRATOR, v. LATTÀ.

**MORTGAGE.**—*Extension of Time.*—*Lien.*—Neither an extension of the time of payment nor a change in the form of the indebtedness secured by a mortgage impairs the mortgage lien.

**TRUST AND TRUSTEE.**—*Mortgage.*—*Investment of Funds.*—*Care Required.*—A trustee to invest funds must seek safe investments, and, as a general rule, a second mortgage is not a safe investment.

**SAME.**—*Liens.*—*Priority.*—*Notice.*—*Assignor and Assignee.*—If a trustee invest trust funds in a mortgage upon lands upon which he personally holds a mortgage of older date, he violates his duty; and equity will give priority to the mortgage taken as trustee, against an assignee of the first mortgage with actual or constructive notice.

**SAME.**—A trustee mortgagee, whose mortgage is a senior lien on land, can not be deprived of such lien merely because he may have a right to make the debt out of a bond executed by his predecessor in the trust by virtue of which the mortgage came to him.

**SAME.**—A purchaser of an interest in lands, burdened with an equity in favor of a trust of which he has actual or constructive notice, holds subject to the trust.

From the Elkhart Circuit Court.

*J. M. Vanfleet*, for appellant.

*W. L. Storey, J. S. Drake and F. D. Merritt*, for appellee.

ELLIOTT, J.—Elias and John Gortner, on December 24th, 1869, executed a mortgage (recorded September 24th, 1870,) to Joseph H. Defrees, president of the First National Bank of Goshen; this mortgage was afterwards assigned to George D. Copeland. Afterwards Copeland became the administrator, with the will annexed, of the estate of one Beebe; the will of the decedent directed that the money of the estate should be loaned, and the interest received paid to his widow during her life, and on January 30th, 1873, the administrator loaned to the Gortners \$2,000, and as security took a mortgage on the land embraced in the mortgage of which he was the owner by assignment, and also on another parcel. The appellee, Mary Latta, without actual notice, after maturity, and for a full consideration, on September 1st, 1873, purchased the mortgage owned by Copeland. The land covered by the mortgage to Copeland as

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Shuey, Administrator, v. Latta.

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administrator, but not by that executed to him individually, was exhausted in the payment of a prior lien, so that the land covered by the first mortgage is the only remaining security; Shuey succeeded Copeland as administrator of Beebe's estate, and in April, 1880, agreed with the Gortners that the time of payment of the debt due the estate which he represented should be extended for six months; the property here in controversy was worth at the time the mortgage was executed \$25,000, and the Gortners were considered solvent, but in May, 1881, a fire destroyed the buildings, leaving only the land, and diminishing the value of the property to \$1,200; Copeland's bond as administrator was good, and he and his sureties were able to pay the full amount claimed at the time he was discharged from his trust.

The fact that Shuey extended the time of the payment did not release the mortgage lien held by him, nor did it take from it any priority of right which it may have possessed. A change in the form of the indebtedness secured by a mortgage does not impair the mortgage lien. *Jones Mortg.*, section 924; *McCormick v. Digby*, 8 Blackf. 99; *Dumell v. Terstegge*, 23 Ind. 397; *People's, etc., Bank v. Finney*, 63 Ind. 460; *Bodkin v. Merit*, 86 Ind. 560. If the mortgage executed to Copeland as administrator was the prior one, then no renewal or extension of time could transform it into a junior one.

A mortgagee having a senior lien on land can not be deprived of his seniority merely because he may have a right to make the debt out of a bond executed by his predecessor in the trust by virtue of which the mortgage came to him. The fact, if such it be, that Shuey might have made the debt off of Copeland and his sureties furnishes no reason for declaring that the order of priority in the two mortgages should be changed. If the lien of the trust mortgage was in reality the paramount one, it could not be affected by the fact that Copeland was liable on his bond for breach of duty. There is no equity in this claim, for it would be unjust to compel mere sureties to bear the loss, even if there were a cold legal right against them, which is not so

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clear. We say that it is not clear that there was a legal right against the sureties, for the reason that if the effect of the principal's act was to displace the lien of his individual mortgage in favor of the one executed to him as administrator, then there was really no injury to the trust estate. It is, at all events, much more equitable that Copeland should bear the loss than that it should be cast upon the sureties on his bond.

Copeland was more than a mere administrator exercising bare statutory powers. He was a trustee. The provision in the will, directing the representative of the decedent to lend the money for the benefit of the widow, constituted the administrator the trustee, and the widow the *cestui que trust*. *Coburn v. Anderson*, 131 Mass. 513; *Marx v. McGlynn*, 88 N. Y. 357. One who accepts a trust created by a will is more than an administrator under the law; he is in the strictest sense a trustee, and subject to the rules governing trustees.

A trustee is required to give to the business of the trust his disinterested zeal, skill and attention, and is bound to do no act that will bring his individual interests in conflict with those of the *cestui que trust*. He must not allow his individual interests to directly or indirectly influence him adversely, and all that he does in the execution of the trust must be for the promotion of the interests of the beneficiary. Investments of trust funds must be made with a view to the good of the beneficiary and for no other purpose; they must not be made to favor friends nor to promote individual interests, but they must be made so that the full benefit shall go where the creator of the trust directed. Safe investments must be sought, and the general rule is that a mortgage on real estate encumbered by prior liens is not a safe investment. In *Mills v. Hoffman*, 26 Hun, 594, it was said: "From our examination of the authorities and the cases referred to, we have come to the conclusion that as a general rule it is the duty of trustees to invest funds held by them, in government or State securities, or in bonds and mortgages on unincumbered real estate." It is said in *Whitney v. Martine*, 88 N. Y. 535, that the right of

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an agent to advance money on a security not of the first-class may well be questioned, and that a second mortgage is not a first-class investment. In *Gilmore v. Tuttle*, 32 N. J. Eq. 611, the general doctrine that investments in second mortgages are not proper ones is recognized, and the trustee was held liable for loss resulting from such an investment. That case is a strong one, for the deed of trust contained a provision that the trustee should only be liable for his "own wilful and intentional breaches of the trust." In *Norris v. Wright*, 14 Beavan, 291, the Master of the Rolls said: "I beg, however, that it may not be understood that I sanction the propriety of trustees lending money on a second mortgage, when they do not get the legal estate." It was said in *Thomson v. Christie*, 1 Macqueen App. Cas. 236, by the Lord Chancellor: "This money was secured by what we should call a second mortgage upon the property, and a gentleman named Alison joined in a bond with seisin as security for the amount which was so advanced. That this would have been an improper security by the law of England is beyond all question." There is good reason for this rule. If trustees were permitted to take second mortgages, the trust fund would often be lost because of the inability to redeem from the prior encumbrance. Take a case like this, where the whole fund is loaned on a second mortgage, and loss is almost certain to follow, for the trust estate has nothing with which to redeem. It is only necessary for us to decide that the general rule is that trustees should not take second mortgages; it is not necessary to declare that this is an invariable rule. It may be that the rule should not be held to be applicable to every case, and we do not so adjudge, but we do adjudge that it does apply where the trustee himself holds the prior mortgage. To permit him to take a second mortgage to secure trust funds would be to allow him to place himself in a position hostile to his beneficiary; for, if he demanded the whole property on the prior lien, he would be in the position of forcing the beneficiary either to redeem or lose the property; if he elected as trustee

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to redeem, it would enable him to use trust funds in payment of his own demands. It is easy to see that such a practice would result in wrong and injustice, and full as easy to see that it is opposed to settled principles of equity jurisprudence.

It was the duty of the trustee to take a first mortgage, and "equity considers that as done which ought to have been done." We hold, in the interest of equity and justice, that we must consider Copeland to have done that which it was his duty to do, and this carries us to the conclusion that the mortgage taken by him in his trust capacity constitutes the prior lien.

A purchaser of an interest in land burdened with an equity in favor of a trust, of which he has actual or constructive notice, holds subject to the trust; and in this case the appellee's assignor had all the knowledge that one could possibly acquire. This weakness of the assignor's title affects the assignee, for she bought a note and mortgage long past due. If she had bought commercial paper before maturity, a different question would have faced us.

Judgment reversed.

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No. 10,702.

## BREHM v. THE STATE.

**BILL OF EXCEPTIONS.**—*Evidence.*—*Record.*—*Short-Hqnd Reporter.*—A bill of exceptions did not purport to contain the evidence, but recited that the court below had ordered that the evidence taken by the reporter be made part of the record, "and the clerk of this court is ordered in any transcript that may be made for the Supreme Court to incorporate the annexed report of such evidence;" this was followed by what purported to be a report of the evidence certified by the reporter and verified by his oath. *Held*, that the evidence was not, under the statute, R. S. 1881, section 1405, before the Supreme Court.

From the Hamilton Circuit Court.

*F. M. Trissal* and *C. D. Potter*, for appellant.

*F. T. Hord*, Attorney General, *W. A. Kittinger* and *W. B. Hord*, for the State.

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Brehm v. The State.

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NIBLACK, C. J.—Brehm, the appellant, was indicted and afterwards, on the 23d day of November, 1882, tried and convicted for selling intoxicating liquor to one William H. Nelson in a less quantity than a quart.

The only question made here is upon the alleged insufficiency of the evidence to sustain the finding of the circuit court. Objection is made that the evidence is not properly in the record.

What purports to be the bill, and the only bill, of exceptions in the cause, was filed the day after the trial and is as follows:

“Be it remembered that upon the trial of the above entitled cause, after the evidence had been heard, the defendant moved the court for a new trial, which motion the court overruled, to which ruling the defendant at the time excepted, and prayed an appeal to the Supreme Court of the State of Indiana, which was granted, and the evidence not appearing of record in said cause, it is now ordered that the defendant’s bill of exceptions be made part hereof, and that the evidence taken by the reporter be also made part hereof, and the clerk of this court is ordered in any transcript that may be made for the Supreme Court to incorporate the annexed report of the evidence in such transcript. Dated, signed and filed this 24th day of November, 1882.” To this the name of the judge who tried the cause is attached.

Then follows in the transcript what is claimed to be a verbatim report of the testimony of the prosecuting witness, and of several other witnesses, introduced at the trial by the State. To that is attached the certificate of Ira A. Kilbourne, styling himself official law-reporter for the Hamilton Circuit Court, and verified with his oath, certifying that the matter contained in the report is a full, true and complete *transcript* of all the evidence given in the cause.

The transcript then closes with the certificate of the clerk of the Hamilton Circuit Court, declaring what precedes to be a full true and complete copy of the papers and entries in the

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Brehm v. The State.

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cause, "together with the long-hand manuscript of the evidence taken by the reporter in said cause."

There is nothing in the transcript showing that Kilbourne was either appointed or sworn as a short-hand reporter in the cause, but as to that no question is now made.

There is no provision in any of the sections of the statute relating to the appointment and duties of a short-hand reporter, which dispenses with bills of exceptions as a means of bringing the evidence before this court upon an ordinary appeal.

The only change to which our attention has been directed, in that respect, is that when a long-hand manuscript of the evidence shall be made by the reporter from his notes and filed with the clerk, and shall have been incorporated in a bill of exceptions, the clerk shall, if requested, certify the original manuscript to this court as a part of the bill of exceptions instead of a transcript of the evidence as in cases in which the evidence has been otherwise written out and embodied in a bill of exceptions. R. S. 1881, section 1405, *et sequitur*.

In the case before us, the document called the bill of exceptions did not incorporate into it the manuscript report assuming to contain the evidence given at the trial. This document constituted what we construe to be an effort to make the manuscript made by Kilbourne a part of the record without including it within, or making it in some recognized way a part of, a bill of exceptions. This effort was ineffectual, because not authorized by any statute or sanctioned by any rule of practice in the courts of this State. *Irwin v. Smith*, 72 Ind. 482; *Williams v. Pendleton, etc., T. P. Co.*, 76 Ind. 87; *Stout v. Stout*, 77 Ind. 537; *Davis v. Liberty, etc., Gravel Road Co.*, 84 Ind. 36; *Hill v. Hagaman*, 84 Ind. 287.

The evidence not having been properly brought into the record, we can not consider any question made upon its sufficiency to sustain the finding.

The judgment is affirmed, with costs.

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 Norris v. Casel.
 

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No. 10,018.

## NORRIS v. CASEL.

50	143
138	328
90	143
143	394

**ASSAULT AND BATTERY.—Damages.—Form of Complaint.**—For form of complaint to recover damages for assault and battery, held good as well at common law as under the code, see opinion.

**SAME.—Contributory Negligence.**—The doctrine of contributory negligence does not apply to a wrong wilfully committed.

**SAME.—Answer.—Son Assault Demeane.—Evidence.**—In a civil suit for assault and battery, *son assault demeane* must be specially pleaded; and without such plea the evidence in justification is not to be considered, though admitted without objection, and in such case instructions, however erroneous, as to what would establish the justification, are not available error on behalf of the defendant.

**INSTRUCTIONS.—Error not Available.—Defects Cured.**—Where it appears affirmatively that the verdict was right on the merits, an erroneous instruction will not reverse the judgment. R. S. 1881, section 658.

From the Superior Court of Vigo county.

*N. G. Buff, D. T. Morgan, B. F. Davis and — Forkner,*  
for appellant.

**HAMMOND, J.**—Action by appellee against appellant to recover damages for an assault and battery. Answer, the general denial; trial by jury; verdict for appellee for \$125; appellant's motion for a new trial overruled; exceptions; judgment on verdict, and appeal to this court.

The first error assigned is, "that appellee's complaint does not state facts sufficient to constitute any good or sufficient cause of action."

The complaint, omitting the title, etc., was as follows:

"The plaintiff complains of the defendant, and says, that on or about the 11th day of June, A. D. 1881, the defendant with force and arms assaulted the plaintiff, and with great force and violence struck the plaintiff with rocks, sticks, brickbats and other missiles, and beat, bruised, wounded and ill-treated him, and other wrongs to him then and there did, by means of which said premises the plaintiff was greatly hurt, bruised and wounded, and became and was sick, sore and dis-

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ordered, and was permanently disabled and injured, and so remains and continues; so much so that his life is despaired of; whereby he was and is hindered and prevented from transacting any business, and has been obliged to lay out and expend a large sum of money, to wit, the sum of \$200, in and about endeavoring to cure and heal himself of his aforesaid wounds, sickness, etc., whereby he is damaged to the amount of \$5,000, for which he demands judgment."

It is urged that the complaint is insufficient, for failing to allege that the injuries complained of were wrongfully inflicted, or that they were not the result of the wrongful acts of the appellee. The complaint would have been good at common law. 2 Chitty Plead. 612. It was good under the statute in force when this case was commenced and tried. Form No. 16, 2 R. S. 1876, p. 360. The doctrine of contributory negligence does not apply to a wrong wilfully committed, as an assault and battery. *Steinmetz v. Kelly*, 72 Ind. 442 (37 Am. R. 170). The objections to the complaint are not well taken.

The appellant has also assigned for error the overruling of his motion for a new trial. The grounds of this motion were that the verdict was not sustained by sufficient evidence, and error of the court in giving instruction No. 7, on its own motion, and instruction No. 2, at the request of appellee, and in its modifications of instructions Nos. 1 and 2, requested by the appellant.

The evidence, we think, was sufficient to sustain the verdict.

Instruction No. 7, complained of, was as follows:

"If the defendant, Norris, for the purpose of getting an excuse and opportunity to assault and beat the plaintiff, provoked the plaintiff by mere words, however gross and abusive, this would not justify the plaintiff in committing an assault upon the defendant; but if the plaintiff, under such circumstances, assaulted the defendant, the defendant can not justify himself for repelling this assault by violence on the plain-

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Norris v. Casel.

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tiff, if he in the first instance brought on the quarrel, that he might have an opportunity and excuse for beating the plaintiff."

The above instruction contains an erroneous proposition of law. The first part of the charge that a provocation by mere words, however gross and abusive, can not justify an assault, is correct; but when the charge, as in the latter part of it, goes further and announces the law to be that if the person, provoked by insulting words, assaults the person who uses them, the latter may not repel the assault, a manifest error is fallen into: If, as is correctly stated, provoking words, merely, do not justify an assault, a person who makes such words a pretext for committing an assault, commits thereby not only a mere wrong but a crime. The person so assaulted is not deprived of the right of reasonable self-defence, even though he used the insulting language to provoke the assault against which he defends himself. Whatever may have been his purpose in using the abusive language, it can not be made an excuse for the assault. The assault, though thus provoked, is unlawful, and whoever is unlawfully assaulted may use such force as is reasonably necessary to protect himself from harm.

But we are to consider whether, under the issue of the case, the appellant was harmed by the erroneous instruction. He answered the appellee's complaint by the general denial. There was no plea of justification, nor any agreement, disclosed by the record, that evidence in justification might be considered under the general issue. The defence of *son assault demesne*, both at common law and under the code, must be specially pleaded. "But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So, also, on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence, and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it." And again: "A *justification* is likewise

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a special plea in bar; as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault." 3 Blackstone Com., pp. 120 and 306. Mr. Chitty in his Pleading, vol. 1, p. 535, says this defence must be specially pleaded. This common law principle of practice and pleading is made emphatic by the code. "All defences, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially." Section 66 of code of 1852, and 356 of R. S. of 1881. Under the issue made by the general denial, the appellant could not defeat the appellee's cause of action on the ground of self-defence. The above instruction, therefore, which the court gave upon the subject of self-defence, though erroneous, was harmless, for it would not have been permitted, under the issue of the case, to benefit the appellant, had it been correct.

Instruction No. 2, given the jury at the request of the appellee, was substantially the same as No. 7, given as above, and, for the foregoing reasons, was harmless.

Instructions numbered 1 and 2, requested by the appellant and modified and given by the court, also relate to the doctrine of self-defence, which, under the issue, was not in the case, and which, though erroneously permitted to be considered by the jury under the instructions, were, to some extent, in the appellant's favor, and he may not complain, though the instructions did not correctly place before the jury the law relating to the right of self-defence. Besides, the evidence fails to show that the appellant was acting in self-defence. He sought a quarrel with the appellee and applied to him opprobrious epithets, and when the appellee retorted in language somewhat excusable under the circumstances, he cast a brick-bat at the appellee, striking him on the head and producing a serious injury. It is true there is some evidence tending to show that appellee, when assailed with the appellant's insulting words, drew a revolver, and threatened to use it, but the weight of evidence is against this, showing quite conclusively that the appellee's revolver was at the time

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at a house some distance away, and that he had at the time no revolver with him. The case was fairly tried on its merits. It is expressly provided by statute that the judgment shall not "be stayed or reversed, in whole or in part, \* \* \* where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Section 658, R. S. 1881. And where a cause has been fairly tried on its merits and a proper result reached in the court below, the judgment will not be reversed on account of error in an instruction. *Cassady v. Magher*, 85 Ind. 228.

There is no error in the record of which the appellant may complain.

The judgment of the court below is affirmed, with costs.

ON PETITION FOR A REHEARING.

HAMMOND, J.—The appellant's counsel insist that the question of self-defence was properly in this case as evidence relating thereto was admitted without objection. But though evidence be admitted without objection as to an issue outside of the pleadings, it can not be considered by the court or jury, except in a case where the record shows an agreement that all matters of defence may be heard under the general issue. *Petrow v. Wiseman*, 40 Ind. 148, 157. There was no such agreement in this case. The instructions of the court must be applicable to the issues as well as to the evidence. 1 Works Pr., section 787.

In this case the court went outside of the issues, and instructed the jury upon the question of self-defence.

While the instruction was erroneous, it did the appellant no harm; it was rather in his favor, for it, to some extent, gave him the benefit of a defence to which he was not entitled under the issues.

Petition for a rehearing overruled.

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McFall *et al.* v. The Howe Sewing Machine Company.

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No. 10,663.

McFALL ET AL. v. THE HOWE SEWING MACHINE COM-  
PANY.

**PRACTICE.**—*Harmless Error.*—A refusal to strike out part of a pleading is not available error.

**BOND.**—*Breaches of.—Pleading.—Practice.*—In a suit upon a bond with conditions, several separate breaches may be assigned in a single paragraph of complaint, and demurrers may be addressed to single breaches.

**SAME.**—*Construction.—Principal and Surety.—Notice.*—A bond with sureties, to secure the fidelity of an agent, stipulated that it should continue in force till terminated by notice in writing, signed by all the obligors. Such notice signed by one of the sureties was given.

*Held*, that the notice did not terminate the liability of any of the obligors.

**SAME.**—*Bond of Agent.—Evidence.*—Where a bond is executed to secure the performance of duty as agent in a specified business, and to secure from him a due accounting for all money received in such business, it is necessary for the obligee in a suit on the bond to show by evidence a breach of duty in the business designated in the bond or a failure to account for money received in the course of such business.

From the Monroe Circuit Court.

*W. H. Martin, S. D. Luckett, G. W. Friedley, E. D. Pearson and N. Cooke*, for appellants.

*M. F. Dunn, G. G. Dunn, G. Carter and J. N. Binford*, for appellee.

**ELLIOTT, J.**—Appellee's complaint is founded on a bond executed by McFall and Allen as principals, and the other appellants as sureties.

A motion was made by appellants to strike out part of the complaint, and the ruling denying it is assigned for error. It is well settled that an error in overruling a motion to strike out part of a pleading will not warrant a reversal.

A complaint on a bond may assign several breaches in one paragraph. In such a case, there is only one cause of action, and that is the bond upon which the pleading is based. There was, therefore, no error in overruling the motion to compel the appellee to separate the complaint into paragraphs.

The complaint is certainly good on demurrer, for it entitles

90	148
127	109
90	148
130	361
90	148
139	125

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the plaintiff to some relief, and a complaint which does this can not be overthrown by a demurrer.

Where several breaches are assigned, and they are distinct and independent, demurrers may be addressed to each breach. The general rule is that parts of a paragraph can not be demurred to, but our cases recognize as exceptions to this rule cases where there are separate and distinct assignments of breaches. *Colburn v. State, ex rel.*, 47 Ind. 310; *Richardson v. State, ex rel.*, 55 Ind. 381. If, however, there is one good assignment of breach, and the demurrer is addressed to the entire complaint, it should be overruled.

The bond in suit provides, among other things, that "It shall continue in force until terminated by the obligors by notice in writing, and that" no notice shall have the effect of terminating the bond unless it be in writing, signed by the parties giving the same and actually delivered to the company at Indianapolis, Indiana. Notice was given by Heitzer, one of the sureties, in his own behalf, and this notice is relied on in his separate answer as releasing him, and in the joint answer of the sureties as releasing all of them.

It is plain from the context that the provision concerning the termination of the bond by notice refers to the sureties, and not to the principals, and we have no difficulty in deciding that it is only the former who are entitled to terminate the contract by the notice provided for in the instrument.

There are three questions discussed. Does the notice release Heitzer alone? Does it release all of the sureties? Does it release any of them? If the letter of the writing is followed, it is clear that the notice, to be effective, must be on behalf of all the sureties, for plural and not singular terms are used. By keeping to the letter of the contract, no violence is done to the intention of the parties. It would be unjust to permit one of the sureties to escape by giving a notice in which his co-sureties did not join, for it would leave unshared the burden which at the outset was common to all. Nor would it be just to the obligee in such a case as

## McGlennan v. Margowski.

this to require him to act upon the notice given by one alone of several sureties, for, by the terms of his contract, he has a right to expect unity of action on the part of the sureties. Whether a surety might secure a release in some other method than that provided by the contract, is a question not before us, and upon which we intimate no opinion. Our conclusion is that notice given by Heitzer did not release the sureties, nor any one of them.

The evidence entirely fails to show that the indebtedness of the principals proved was covered by the bond. Where a bond is executed to secure the performance of duty as agent in a specified business, and to secure from him a due accounting for all money received in a designated business, it is incumbent on the obligee who sues on the bond to show a breach of duty in the business designated in the bond, or a failure to account for money received in the course of such business. In the present case, the evidence shows an indebtedness from the principal obligors, but it does not show that it was incurred in the business designated in the bond.

Judgment reversed.

No. 10,704.

## MCGLENNAN v. MARGOWSKI.

**HABEAS CORPUS.**—*Sufficiency of Petition.*—*Civil Action.*—*Assignment of Error.*

—An application for a writ of *habeas corpus* is not a civil action, and, therefore, an assignment of error, that the petition for the writ does not state facts sufficient to constitute a cause of action, does not call in question the sufficiency of such petition.

**SAME.**—*Motion to Quash.*—*Answer or Return.*—*Exception.*—*Demurrer.*—The sufficiency of the petition is questioned, not by a demurrer for the want of facts, but by a motion to quash the writ; nor can the sufficiency of the answer or return to the writ be questioned by a demurrer, but only by an exception.

**SAME.**—*Parent and Child.*—Where, however, the petition of a father shows that he is deprived of the custody of the person of his legitimate child,

90	150
139	273

90	150
141	22

90	150
148	385
148	388

90	150
157	7

90	150
169	119

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McGlennan v. Margowski.

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of the tender age of eleven years, by the acts of the defendant, in whatever form the question is presented, the petition is sufficient.

**SAME.—Practice.—Summary Proceeding.—Hearing.**—Under section 1118, R. S. 1881, a proceeding by *habeas corpus* is to be heard and determined in a summary way, and neither the court nor judge can be required, as in a civil action, to make a special finding of the facts or state conclusions of law thereon.

**SAME.—Father and Child.—Custody of Infant.**—The general rule is that the father of a legitimate infant child is entitled to the possession and control of the child's person, as against any other claimant, and under section 2518, R. S. 1881, this is the statutory rule in this State.

**SAME.—Judgment for Costs.—Error.—Supreme Court.**—There is no error in adjudging costs against the unsuccessful party in a *habeas corpus* proceeding, and certainly none, where the judgment for costs is complained of for the first time in the Supreme Court.

From the Carroll Circuit Court.

*R. C. Pollard* and *F. P. Hench*, for appellant.

*J. Applegate* and *C. R. Pollard*, for appellee.

**Howk, J.**—The appellee filed his petition in this cause, wherein he represented to the court below, in substance, that he was the father of Theresa Margowski, a girl about eleven years of age; that the appellant had the custody of such child, and refused to surrender her to the appellee, though often requested so to do; that the mother of said Theresa lived and died a devout Catholic; that the appellee was a member of the Catholic church, as were also the brothers and sisters of said Theresa and the appellee's then wife; that all the blood relatives of said Theresa were anxious that she should be reared and instructed in the faith of her father; that it was especially a matter of conscience and of the most solemn duty to the appellee to see that his children be so reared; that his said daughter had then arrived at that age when it was indispensable to her eternal welfare and to that of the appellee that she should receive from the Catholic church proper religious instruction to prepare her to take her first important step in her religious life, to wit, her first communion; that the appellant had no regard for the faith of the Catholic church, and was suffering said Theresa to grow

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McGlennan v. Margowski.

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up irreligious and without the influence of the church; that the appellant was a widower; that the appellee had a wife and a home, and was anxious to have the custody of his daughter restored to him, that she might form and retain the natural attachment for him due from a daughter to her father, and also those fraternal relations which should subsist between brothers and sisters; that appellee was able comfortably to maintain his said daughter, and to afford her all the advantages of secular education which she then enjoyed, and to afford her immeasurably greater advantages for receiving a proper religious training, all of which he was not only willing but anxious to do; and that the appellant, without right, unlawfully withheld the custody of said Theresa from appellee; wherefore the appellee prayed an inquiry into the truthfulness of the matters alleged, and that, upon such hearing, the custody of such child be withdrawn from appellant, and that she be remanded to the custody of the appellee.

This petition was duly verified by the oath of appellee, and thereon a writ of *habeas corpus* was issued directed to the appellant, to which he made a written return or answer. Upon the hearing had, the court found that the matters and things set forth in the petition were true; that the appellee was the father of Theresa Margowski and entitled to the custody of her person; that the appellant did then, and at the commencement of this cause, unlawfully have the custody of the person of said Theresa, and unlawfully restrained her of her liberty, and unlawfully deprived the appellee of the custody of her person. Thereupon the court adjudged and decreed that the person of Theresa Margowski be restored to her father, the appellee, and that he have the care and custody of her person, and that the appellant surrender to appellee the person and custody of the said Theresa, etc. Appellant's motion for a new trial having been overruled, and his exception saved, he has appealed from the judgment below to this court.

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McGlennan v. Margowski.

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He has here assigned the following errors :

"1st. The petition does not state facts sufficient to constitute a cause of action ;

"2d. The court erred in overruling appellant's motion for a new trial ;

"3d. The court erred in overruling the appellant's motion for a special finding of the facts, and the conclusions of law thereon ; and,

"4th. The court erred in rendering judgment for costs against the appellant."

An application for a writ of *habeas corpus* is not a civil action. *Baker v. Gordon*, 23 Ind. 204. It might well be doubted, therefore, whether the sufficiency of the petition or complaint for the writ could be tested by a demurrer thereto, for the want of facts. The party to whom the writ is directed makes his return or answer, not to the petition or complaint, but to the writ itself. The sufficiency of the writ may be tested before making a return or answer thereto, not by a demurrer, but by a motion to quash the writ. The return or answer to the writ is not the subject of demurrer, but its sufficiency may be tested by exception. Section 1117, R. S. 1881 ; *Cunningham v. Thomas*, 25 Ind. 171. We are of the opinion, therefore, that an assignment here, that the petition or complaint for the writ does not state facts sufficient to constitute a cause of action, comes too late and presents no question for our decision. But if the petition or complaint for the writ could be attacked for the first time by an assignment of its insufficiency as error, in this court, we would hold that it was sufficient, *prima facie*, to authorize the issue of the writ. It is true that the petition contained much surplusage and irrelevant matter, but it showed the material fact that the appellee was deprived of the custody of the person of his motherless daughter, of the tender age of eleven years, by the acts of the appellant. This showing would have been sufficient, *prima facie*, to entitle the appellee to the issue of

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McGlennan v. Margowski.

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the writ, even if its sufficiency had been questioned below by a demurrer for the want of facts, and surely it is sufficient, when questioned for the first time in this court.

In section 1118, R. S. 1881, it is provided as follows: "The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party." Under the first clause of this section, we are of opinion that the court committed no error in overruling the appellant's motion or request that the court would make a special finding of the facts in writing, and state its conclusions of law thereon. As we have already said, this is not a civil action, and the provisions of the code, in relation to the trial of civil causes, are not applicable to the hearing by court or judge of a *habeas corpus* proceeding. In *Garner v. Gordon*, 41 Ind. 92, this court held that a proceeding by *habeas corpus* is not a civil action, within the meaning of the section of the code authorizing a change of venue; nor is it a civil case, within the meaning of section 20 of the bill of rights, in the State Constitution of 1851, authorizing a trial by jury. The hearing and determination of the cause is summary under the statute.

The learned judge of the court, who presided at the hearing of this cause, filed a written opinion therein, which is printed as an *addendum* to one of the briefs of counsel. From this opinion, we take the following summary of the facts established by the evidence in this case, which we have found upon examination to be substantially correct:

"The plaintiff claims the custody of his daughter, who is about eleven years of age, and now in custody of defendant. The facts, as disclosed by the evidence, are briefly these:

"The girl's mother died when she was only a few weeks old. About the same time the defendant's infant child died, and at the request of the defendant and his wife (since deceased) the plaintiff permitted the defendant to take the child in controversy to be nurtured by his wife. She has ever since

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McGlennan v. Margowski.

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remained with the defendant, and has been kindly treated and cared for at the expense of the defendant. Both parties are sober, industrious and respectable men, depending on their daily labor for their means of support, and both are sincerely attached to the child, and are willing to support and educate her. Since the death of the defendant's wife, his family consists of himself, his little son, and his mother, aged sixty-three years, who only remains with the defendant a part of the time. When absent her place is occupied by a hired servant. The plaintiff has again married, and the evidence shows that his wife is kind and indulgent to his other children, and that she is suitable in every respect to fill the place of a mother to this little girl.

"The plaintiff is a consistent member of the Catholic church, and regards it as his conscientious duty to have the child instructed and reared in that religious faith; while the defendant is an adherent of the Protestant faith, and desires that the child shall attend such school and such church as she may herself select."

These were the material facts of this case, as disclosed by the evidence, and upon these facts we can not disturb the finding of the trial court. Other things being equal, there can be no doubt, we think, that the father of a legitimate infant child is entitled to the possession and control of the child's person as against any other claimant. In *Child v. Dodd*, 51 Ind. 484, this court said: "The universal law of all nations gives the possession and control of children to the male parent, if begotten and born of wedded parents. This control may be taken away, when an overweening or strong necessity is shown as to the unfitness of the father of the child to protect and provide for it, which is not shown in this case." In section 2518, R. S. 1881, as applicable to the case in hand, it is provided "That the father of such minor \* \* \* shall have the custody of the person and the control of the education of such minor."

In *State, ex rel., v. Banks*, 25 Ind. 495, this court said:

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"The father is the natural guardian of his infant child, is responsible for its raising and education, and has the right to its custody. This is the well settled rule, and the statute is simply declaratory of the right as it existed at common law. The law, however; has a tender regard for the interest of the infant, and in case it is made to appear that the father, by reason of his immoral and vicious habits and conduct, is rendered unfit to have the custody and training of his infant child, the court will refuse to award it to him, or will even direct it to be taken from him and placed where its moral training will be properly cared for. But if the father be a suitable person, the statute is express that he shall have the custody of the person and control of the education of his minor child. \* \* \* \* The court should judge upon the circumstances of the particular case, and give direction accordingly. If no restraint is found to exist, and the infant is of sufficient age to be capable of using a discretion; the court may simply declare it at liberty to go where it will. But where the child is too young to exercise a discretion or have a choice, it is the duty of the court to award the custody to the person legally entitled to it, 'because the law presumes that where the legal custody is, no restraint exists, and where the child is in the hands of a third person, that presumption is in favor of the father.' *The King v. Greenhill*, 4 Adol. & Ellis, 624; *The King v. Isley et ux.*, 5 *id.* 441; *Rex v. Delaval*, 3 Burr. 1436; *Commonwealth v. Addicks et ux.*, 5 Binn. 520."

It is manifest that the trial court, in the case at bar, had much better facilities and opportunities than we can have for determining which of the two parties ought to have the care, custody and control of the appellee's infant child. Upon the evidence in the record, it seems to us that the finding and decision of the court, awarding the custody of the child to her father, were right and in strict accordance with the law. *Reeves v. Reeves*, 75 Ind. 342; *McKenzie v. State, ex rel.*, 80 Ind. 547.

It is claimed that the court erred in permitting the appel-

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McGlennan v. Margowski.

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lee, as a witness in his own behalf, to testify to certain matters, over the appellant's objection. The record fails to show, however, that the grounds of his objection were stated to the court by the appellant. It is the settled rule, in such a case, that unless the record shows that the party objecting to the admission of evidence pointed out below the grounds of his objection, this court will not, on appeal, consider the objection. *Wright v. Williams*, 83 Ind. 421, and cases cited. Besides, it is stated in the bill of exceptions, that "the court did not consider the testimony objected to, and so announced to the parties at the time such testimony was given." The error of the court, in the admission of such testimony, if it were such, was, therefore, a harmless error, and the judgment will not be reversed for such an error.

The appellant has assigned as error the judgment rendered against him for the appellee's costs. The court did not err, we think, in the rendition of this judgment; but, if it did err, the appellant can not complain of the error, for the first time, in this court. The record fails to show that he objected or excepted to the judgment at the time of its rendition, or that he moved the court to modify the same, or to set it aside. It is settled that an objection to the judgment made here for the first time will present no question for our decision. *Lewis v. Edwards*, 44 Ind. 333; *Smith v. Tatman*, 71 Ind. 171; *Teal v. Spangler*, 72 Ind. 380.

We have found no error in the record of this cause requiring the reversal of the judgment.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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The Board of Commissioners of Morgan County v. Seaton.

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No. 10,692.

THE BOARD OF COMMISSIONERS OF MORGAN COUNTY  
v. SEATON.

JURISDICTION.—*Judge pro tem.*—Where a cause was tried by a judge *pro tem.* without objection below, none can be made in the Supreme Court.

TOWNSHIP TRUSTEE.—*Board of County Commissioners.*—*Poor.*—*Employment of Physician.*—*Statute Construed.*—*Question of Fact.*—*Contract.*—A poor person, being sick, required such attention as the physician employed by the commissioners could not give by reason of his remote residence.

*Held*, that in such case the township trustee might, under section 5764, R. S. 1881, employ a physician.

*Held*, also, that it was a question of fact whether the township was "provided for."

*Held*, also, that the necessity of the employment was to be decided by the trustee, and, in the absence of fraud or collusion, his determination was conclusive.

From the Morgan Circuit Court.

*L. Ferguson*, for appellant.

*C. E. Davis* and *E. C. Steele*, for appellee.

BICKNELL, C. C.—This was a claim by the appellee against the appellant for medical attendance upon two paupers, at the request of the township trustee. The county board refused to allow the claim; an appeal was taken to the circuit court; there the appellee had a finding for \$67.75. A motion for a new trial was overruled; judgment was rendered on the finding, and the county appealed.

The errors assigned are:

1. Overruling the motion for a new trial.
2. The court erred in assuming jurisdiction of said cause, when, as shown by the record, the same was not properly before it on appeal from the commissioners' court.
3. The court erred in assuming jurisdiction and sitting as judge of the Morgan Circuit Court, when the sitting judge was not incompetent, and in the absence of an agreement by the parties to that effect.

The record, however, does not show want of jurisdiction;

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The Board of Commissioners of Morgan County v. Seaton.

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this was a case in which a judge might have been lawfully appointed, and no objection to the jurisdiction was made below. Where a cause is tried and may be tried before an appointee, and his authority is not objected to in the court below, it can not be assailed in this court. *Winterrowd v. Messick*, 37 Ind. 122; *Kennedy v. State*, 53 Ind. 542.

The reasons alleged for a new trial were:

1. The finding was contrary to law.
2. The finding was contrary to the evidence.

The question is, was the county bound to pay for the services in controversy under section 1 of the act of March 5th, 1859, which is the same as section 5764, R. S. 1881?

This section declares that the county board shall contract with physicians to attend to the county poor, and that no physician's claim for medical services shall be allowed by the board, except in pursuance of the terms of such contract: "*Provided*, That this section shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require."

Township trustees are overseers of the poor within their respective townships. R. S. 1881, section 6066. Where the county has not employed a physician to attend to sick paupers outside of the poor-house and jail, the township trustee has authority to employ a physician for such persons in his jurisdiction. *Board, etc., v. Ford*, 27 Ind. 17; *Board, etc., v. Boynton*, 27 Ind. 19.

And although the county has employed a physician to attend to the county poor generally, yet, if he should abandon his contract, the township trustee may provide other necessary medical attendance for the sick poor of his township. *Conner v. Board, etc.*, 57 Ind. 15.

The question as to the necessities of the persons relieved is a matter for the determination of the trustee, and, in the ab-

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Hawley v. Williams, Executor.

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sence of fraud or collusion, his determination is conclusive. *Commissioners v. Holman*, 34 Ind. 256.

The question whether the township is "not otherwise provided for" is a question of fact. *Board, etc., v. Boynton*, 30 Ind. 859. •

In the present case, the finding for the appellee was substantially a finding that the township was "not otherwise provided for."

The evidence tended to sustain the finding. It appeared that the sick persons treated by the appellee had typhoid fever, and required the attendance of a physician twice a day, and that the person employed by the county to attend to the county poor lived too far away to give these persons such medical services as they required.

The finding was not contrary to evidence, nor contrary to law. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

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No. 10,287.

HAWLEY v. WILLIAMS, EXECUTOR.

NEGLIGENCE.—*Physician.—Complaint for Malpractice.*—A complaint against a physician for negligence in treating a patient should allege specifically the things concerning which negligence is imputed, and, if it fail in this, it is error to overrule a motion to make more specific.

From the Fayette Circuit Court.

*B. F. Claypool, L. W. Florea and J. H. Claypool*, for appellant.

*J. W. Connaway and T. D. Evans*, for appellee.

HAMMOND, J.—The appellee's testatrix sued the appellant

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Hawley v. Williams, Executor.

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in the Union Circuit Court to recover damages for his alleged malpractice, as a physician, in treating her during her illness in March, 1879. The venue of the case was changed to the court below, and there tried by a jury in April, 1882, resulting in a verdict for the plaintiff for \$1,000. After appeal to this court, the death of Eliza A. Hawley, the plaintiff below, being suggested, the name of her executor, George Williams, was substituted as appellee.

The complaint of the appellee's testatrix, omitting the title, was in two paragraphs, as follows:

"1. Said plaintiff complains of said defendant, and says that on the — day of —, 1879, at the county of Union, and State of Indiana, the plaintiff, at the request of the defendant, retained and employed the defendant as a physician to attend upon the plaintiff and endeavor to cure her of an illness under which she then labored, for reward; and the defendant accepted and entered upon the said retainer and employment; yet the defendant conducted himself in an ignorant and unskilful and negligent manner in that behalf, whereby the plaintiff, without any fault or negligence on her part, became worse and was greatly injured in her health and constitution, and suffered pain and was prevented from following her usual employment and her recovery greatly delayed, and disease of the lungs contracted, whereby she was damaged in the sum of \$3,000. Wherefore," etc.

"2. And for a second and further cause of action against the defendant, the said plaintiff says that the said defendant was a practicing physician and surgeon at said county and State, and on the — day of —, 1879, and thereafter for a long time, was called upon by the plaintiff to visit and attend her and endeavor to cure her of an illness under which she then labored and was therefrom sick; and the said defendant was then, and on divers days and times after said last mentioned day and before the time of bringing this suit, requested by the plaintiff to treat her and to administer the proper med-

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*Hawley v. Williams, Executor.*

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icines and treatment for the cure of plaintiff; and the said plaintiff says that the said defendant, on the days and times aforesaid, undertook, as such physician and surgeon, to administer medicines and to treat plaintiff for her said sickness and ailment; and the plaintiff avers that the said defendant so negligently and unprofessionally managed and treated said plaintiff that she became, by reason thereof, sick and permanently diseased with a dangerous disease which has totally destroyed and impaired her health and caused her to become an invalid and to be totally, from that time to the bringing of this suit, an invalid, and to require constant nursing, change of climate and other physicians, so that her health is entirely ruined; and the plaintiff avers that during the sickness aforesaid of plaintiff, and while defendant was treating her, he so negligently and unskilfully and unprofessionally administered said medicines, and then and there also gave and administered such poisonous, noxious and improper drugs to said plaintiff that she was thrown into spasms, became diseased with a complication of diseases and all her physical power to do and perform her ordinary duties failed her; whereby she has been damaged in the sum of \$3,000. Wherefore plaintiff demands judgment for \$3,000," etc.

The appellant filed his motion, in writing, to require the testatrix to make each paragraph of her complaint more specific as to the nature of her sickness and disease; the nature and manner of the appellant's treatment of her; the kind of medicines administered, and the particulars of her grievances. This motion was overruled, an exception was properly saved, and the assignment of errors requires us to determine the correctness of the ruling upon this motion.

Had no objection been taken to the complaint by way of motion to make its averments more specific as to the acts of negligence and unskilfulness complained of, it may be that each paragraph would be sufficient on demurrer; but whether it would be good upon demurrer or not, a point we do not decide, we are quite sure that the appellant's motion to make

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its allegations more specific should have been sustained. It will be observed that the averments of the complaint are made in the most general way. It is impossible to gather from them any idea of the nature of the testatrix's illness, nor what the appellant did or omitted to do that constituted the negligence and unskilfulness complained of. While the complaint is full of conclusions, it is wholly barren of any specific statement of facts.

In *Jeffersonville, etc., B. R. Co. v. Dunlap*, 29 Ind. 426, this court said: "So far as we are aware, all the forms, and certainly every rule of pleading which can be applied to the subject, while dispensing with the necessity of a prolix statement of the particulars constituting negligence, do require that the act which was characterized by negligence shall be stated."

*The Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297, was an action to recover damages from the railroad for injuries received by the plaintiff, and members of his family, while being carried as passengers on the defendant's railroad. The averments in the complaint as to negligence were as follows: "While on said car as aforesaid, with his said wife and children, to be transported and carried as aforesaid, without any fault, carelessness or negligence on his part, or on the part of his said wife and children, or either of them, said car, in which he and his said family were then and there riding and being carried by said defendants, was, at the county of Union, and State of Indiana, by and through the fault, carelessness and negligence of the said defendants, their agents and employees, thrown with great violence from said railroad track, over and down an embankment of the height of twenty feet, causing great injuries," etc. A motion to make the complaint more specific in regard to the charge of negligence having been overruled by the trial court, this court upon that point says: "In our opinion, this motion was a proper one, made at the proper time, and should have been sustained. \* \* \* What the appellant did, or omitted to do, of which it could be said that it was done, or omitted to be done, through the fault, neg-

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ligence and carelessness of the appellant, the appellee has failed to allege in his complaint. Had the appellant negligently and carelessly constructed its line of railroad? Or had the appellant negligently and carelessly suffered its line of road to get and remain in bad repair and in an unsafe condition? Or, again, had the appellant's employees negligently and carelessly run its train of cars over its road? Or in what did the negligence and carelessness of the appellant consist, of which the appellee complained? The negligence and carelessness of the appellant were the gist of appellee's cause of action, and the rules of good pleading certainly required that the appellee should state in his complaint, with clearness and precision, the particular acts of the appellant on which he predicated his charge of negligence and carelessness."

In the case at bar the testatrix's cause of action was based on the unskilfulness and negligence of the appellant as a physician in professional attendance upon her during her sickness. The complaint fails to allege a single act performed or omitted by the appellant, constituting the unskilfulness or negligence complained of. We think, in the language of the appellant's brief, that "the bare allegation that appellant 'conducted himself in an ignorant and unskilful and negligent manner in that behalf,' uncoupled with any statement of facts, showing wherein appellant acted ignorantly, unskilfully or negligently, is simply pleading a conclusion, and we know of no rule of law that excepts this class of cases from the established rules of pleading in general, which require that facts, not conclusions, be stated in the pleadings."

Counsel for the appellee insist that a more particular statement of the facts was unnecessary, as all these are presumed to have been well known to the appellant. This position will not do. Logically carried out to its full extent, it would dispense entirely with a complaint in an action of this kind.

We think that a physician charged with negligence and unskilfulness in the practice of his profession is entitled to be advised of the specific acts of commission or omission which

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Main v. Killinger.

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constitute the negligence and unskillfulness complained of, so that the plaintiff's proof may be confined to such acts, and so that he may reasonably prepare for his defence.

Other errors are complained of, but as the judgment will have to be reversed they need not be considered.

Judgment reversed, and cause remanded, at appellee's costs, with instructions to the court below to sustain the appellant's motion to make each paragraph of the complaint more specific upon the points set out in said motion.

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No. 10,712.

## MAIN v. KILLINGER.

**BOUNDARIES.—Survey.—Evidence.**—Where adjoining land-owners cause the division line between them to be surveyed and established, such survey conclusively establishes such line, and is binding alike upon them and all who claim under them.

**SAME.—Agreement.—Possession and Occupancy.—Title.—Prescription.**—When such proprietors agree upon a division line, and one takes possession and occupies the land to such line, peaceably and undisturbed, under claim of title, for more than twenty years, such possession divests the other of any title that he may have had to the land so occupied.

**SAME.—Adverse Possession.—Statute of Limitations.**—When parties agree upon such line, and each occupies to such line for more than twenty years, such agreement and occupancy give title to the line without reference to the true line.

From the Greene Circuit Court.

*E. E. Rose* and *E. Short*, for appellant.

*A. G. Cavins* and *E. H. C. Cavins*, for appellee.

**BEST, C.**—The appellee brought this action to recover from the appellant a strip of land twenty-eight feet in width off the east side of the southwest quarter of the northwest quarter of section 6, township 7 north, of range 4 west, in Greene county, Indiana. An issue was formed; trial by the court, finding and judgment for the appellee. A motion for

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Main v. Killinger.

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a new trial, because the finding was not sustained by the evidence and was contrary to the law, was overruled, and this ruling is assigned as error.

The facts agreed upon show that Ephraim Brighton, under whom the appellant claims, owned the southeast quarter, and that David Neidigh, under whom the appellee claims, owned the southwest quarter, of the northwest quarter, of said section, and that, in 1858, they caused the land to be surveyed and the division line to be established between them. The line thus established is the eastern line of the strip now in dispute. The Terre Haute and Louisville road ran diagonally across the southwest corner of the southeast quarter of the northwest quarter of said section, and after said line was established, about half an acre of said southeast quarter was south and west of said road. This piece of land was at once sold and conveyed by Brighton to Neidigh, and they then built a division fence upon this line from the north to the south side of the road, and thence with the road to the south line of said southeast quarter. Neidigh at once took possession of all the land west of this line as his own, improved it, cultivated it, and planted an orchard upon the strip in dispute. This land has been in the quiet, peaceable and undisturbed possession of Neidigh, and those claiming under him, for more than twenty years, and until July, 1881, when the county surveyor surveyed the same and fixed the line twenty-eight feet west of the line originally established. Thereupon the appellant moved the partition fence and took possession of the strip in dispute as a part of the southeast quarter of the northwest quarter of said section. The last survey, it is stated, was made by consent.

These facts, in our judgment, fully support the finding of the court. The survey originally made, aside from the agreement of the parties, conclusively established the line, and is binding alike upon the parties and all who claim under them. *Herbst v. Smith*, 71 Ind. 44.

Aside from this, the possession taken and maintained un-

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der claim of title by Neidigh and those claiming under him for more than twenty years, divested Brighton of any title to said disputed strip, if he had any. *Bowen v. Preston*, 48 Ind. 367, and authorities there cited.

Independent of all this, the evidence shows that the owners of this land fixed the division line by agreement, and that, in pursuance of such agreement, they occupied the land to the line. This was done for more than twenty years by each or those claiming under them, and this agreement and occupancy gives title to the line without reference to where the true line may be. *Foulke v. Stockdale*, 40 Iowa, 99; *Hiatt v. Kirkpatrick*, 48 Iowa, 78; *Brown v. Anderson*, ante, p. 93.

Under these circumstances, the appellant was not entitled to the land, and the judgment against him should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the appellant's costs.

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 No. 9925.

### REAM v. KARNES ET AL.

**FRAUDULENT CONVEYANCE.—Insolvency.—Complaint.**—An averment, that the defendant in an execution had not, when the execution was issued, as much personal property as is by law exempt from execution, and that in 1880 he conveyed the real estate in question to his wife, thereby leaving no property in his hands subject to execution, sufficiently shows the debtor's insolvency to justify a levy on property fraudulently conveyed.

**SAME.—Consideration.—Husband and Wife.—Resulting Trust.**—In 1846, money of the wife belonged by law to the husband, and a purchase by him of lands therewith, in his own name, created no resulting trust in her favor, and a conveyance of such lands to her, without any other consideration, would be fraudulent as against his creditors.

From the Miami Circuit Court.

*R. P. Effinger* and *M. Winfield*, for appellant.

*J. M. Calvert*, *H. J. Shirk* and *J. Mitchell*, for appellees.

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FRANKLIN, C.—This was a suit brought by the appellant against the appellees, including the sheriff of Miami county, to quiet her title to certain land, and to enjoin the sale of the same by the sheriff upon executions in favor of the other defendants.

The defendants filed a joint answer and separate answers, and, except the sheriff, separate cross complaints, each in two paragraphs. Demurrers were filed to each paragraph of the several cross complaints, and severally overruled by the court. An answer in two paragraphs was filed to the several cross complaints. A demurrer was filed to the second paragraph of answer, overruled, and a reply in denial filed.

There was a trial by jury, a special verdict returned, upon which, among other motions, each party moved for judgment. The court overruled appellant's motion for judgment in her favor, and sustained appellees' motion, and rendered judgment in favor of appellees for costs.

Errors have been assigned upon the foregoing rulings.

The paragraphs of the separate cross complaints are very much alike, and appellant has selected one as a sample of all, in which, the objection to the first paragraph is, that it does not allege that John Ream had not other property sufficient to pay his debts.

It alleges that each of the judgment defendants "had previous to the levy on said lands filed their schedule in exemption on execution issued against them, and that neither of them had as much personal property as is allowed by law to a debtor as exempt from execution; that said John Ream, on the 11th day of March, 1880, conveyed said real estate to his wife, Elizabeth Ream, the plaintiff herein, without leaving any property in his own name to pay the said defendant Mary Stoneman her debt, or any part thereof."

We think this sufficiently shows John Ream's insolvency, without this land, at the date of the execution of the deed, and the fact, that he filed his exemption schedule to the execution herein sought to be enjoined, sufficiently shows that he

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so remained insolvent up to the commencement of this suit and the filing of the cross complaint.

We think this paragraph of the cross complaint is sufficient to withstand the demurrer, as against the only objection presented.

The objection to the second paragraph of the cross complaint is that it attempts to plead an estoppel, but does not state facts sufficient to constitute an estoppel.

This paragraph substantially alleges that said John Ream and others, on the 8th day of May, 1877, executed a note to her for \$200; that at that time, and for thirty years immediately previous thereto, to wit, from June 20th, 1846, the said John Ream held the legal title by deed to the land described in the complaint; that she recovered a judgment on said note on the 2d day of June, 1880, and caused an execution to issue thereon on the 21st day of July, 1880; that the sheriff demanded property thereon on the 26th day of July, 1880; the said execution defendants refused to turn out any, and said sheriff, after making diligent search for the same, failed to find any; and that on the 13th day of November, 1880, he levied the same on the said lands; that before said levy each of said execution defendants filed an exemption schedule of property, and neither had any property subject to execution; that said John Ream and the plaintiff Elizabeth Ream are husband and wife, and that said John Ream, on the 11th day of March, 1880, conveyed said real estate to his wife, said Elizabeth Ream, without leaving any property in his own name to pay the defendant; that said John Ream purchased said land in 1846, and took the title in his own name; that she admits that said Elizabeth furnished the money out of her own means to said John Ream to purchase said land; but, notwithstanding this, she avers that said Elizabeth permitted her said husband to hold the legal title thereto in his own name continuously for a period of over thirty-three years, to wit, from June 20th, 1846, to March 11th, 1880; that she permitted him during said entire time to treat said lands as his own, cultivating them

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and selling the proceeds thereof, and to hold himself out to the world as the sole owner thereof; that she permitted him to pay taxes thereon and have the same taxed in his name during said entire time; that she permitted him to incorporate his own means in it, by making lasting and valuable improvements thereon, of the value of \$4,500, specifying such improvements, and alleging that all of them were made with his own means, and which facts were all well known to the plaintiff; that at the time said note was given said defendant had no knowledge whatever that said lands were bought with moneys belonging to said plaintiff, nor that she claimed any interest or title to said lands, but believed said John Ream was the owner thereof in good faith, and knew no better until after said John Ream had conveyed said land by deed to said Elizabeth. Wherefore, etc.

The view that we have taken of this paragraph of the cross complaint renders it unnecessary to examine and decide upon the sufficiency of the facts stated to constitute an estoppel to the plaintiff's equitable claim to the lands.

From the facts stated, we conclude that the plaintiff never had any equitable claim to the lands.

The facts stated show that the money, although it came from the estate of the wife's father, was invested by the husband in the lands in his own name, in 1846. At that time the common law rule, that the money belonged to the husband by virtue of his marital relations, prevailed, and without any agreement or directions to the contrary, he had a right to invest the money in lands in his own name, without any claim resulting to his wife. If there was anything in the transaction that made it an exception to the common law rule, in order to make it available, it must be set up by way of answer to the cross complaint, and not by demurrer.

There was no error in overruling the demurrers to the cross complaints.

The next specification of error insisted upon is that the

court erred in overruling appellant's motion for judgment on the special findings of the jury.

The special findings are too numerous and lengthy to copy in this opinion. They substantially show that appellant and her husband moved to this State in the year 1846; that she had \$800, derived from her father's estate, with which she directed her husband to purchase real estate; that he invested the same in the 160 acres of land described in the complaint, and took the deed in his own name; that they took possession of and lived upon the land from that time forward; that on the 11th day of March, 1880, the husband conveyed the lands to appellant to prevent them from being sold to pay his debts; that before that time he had become involved in debts to the amount of \$6,000, which then existed; that they lived upon the farm as a common family, without any agreement as to how it should be managed; that he invested the proceeds of his labor and the products of the farm during the time in making improvements thereon; that he paid the taxes, made the improvements, and exercised acts of ownership over the lands from 1846 to March 11th, 1880; that defendants believed he was, and relied upon his being, the owner of said real estate; that appellant knew when the deed was made to her on March 11th, 1880, of her husband's indebtedness to defendants; that the husband had incorporated his own means in the improvement of the lands; that the deed to the husband was duly recorded in July, 1847; that when he deeded the lands to his wife, he had no property left subject to execution. "That appellant was ignorant of her true estate of title to said lands until her husband became involved, when she learned the title was in her husband, and to prevent these lands from being sold to pay his debts, she requested him to make a deed to her, which he did." The jury also found that the consideration of the deed was \$800, but it was "further stated therein as the consideration of said deed, that the lands were purchased with her money, and the title taken in his name by mistake, and that said deed was exe-

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Ream v. Karnes et al.

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outed to correct said mistake or for to stay said judgments and executions."

This mistake, having rested so long undiscovered, would probably have remained so, had not her husband become involved in debts.

There is nothing in the findings creating any trust in the husband.

The request that the money be invested in real estate, did not require that the real estate should be held for her use, and under it the deed would rightfully go to the husband. It does not appear that any question was then made as to whom the deed should be made. And it seems as though there was then a surrender by the wife to the husband of all claim to the money or the property in which it was invested.

As there is nothing in this case that makes it an exception to the common-law rule, the husband having reduced the wife's money to his possession, and invested it in real estate in his own name, he became both the legal and equitable owner of the lands at the date of the deed in 1846. 1 Shars. Bl. Com. 434; *Miller v. Blackburn*, 14 Ind. 62; *Lichtenberger v. Graham*, 50 Ind. 288; *Westerfield v. Kimmer*, 82 Ind. 365; *Waldron v. Sanders*, 85 Ind. 270. See authorities therein cited.

According to these authorities, the husband being in law the owner of the money at the time of its investment, there was no consideration for the deed made by him to his wife on the 11th day of March, 1880. The deed was clearly made to defraud creditors, and as such is void as to them. The special findings clearly establish appellees' counter-claims, and appellant had no right to judgment in her favor upon the facts found. There was no error in overruling her motion. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

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Wallace v. Ransdell.

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No. 10,424.

## WALLACE v. RANSDOLL.

NEW TRIAL.—*Motion, when Made.—Verdict.—Practice.*—Where a verdict is rendered on the last day of the term, a motion for a new trial made on the first day of the succeeding term is in time. R. S. 1881, section 561.

INSTRUCTIONS.—If instructions taken together are without conflict, and properly and fully express the law, a single one, incomplete standing alone, is not, on that ground, liable to objection.

From the Johnson Circuit Court.

*T. W. Woollen, D. D. Banta, J. L. White and W. J. Buckingham*, for appellant.

*G. M. Overstreet, A. B. Hunter, R. M. Miller and H. C. Barnett*, for appellee.

BICKNELL, C. C.—The appellee sued the appellant for negligence. The complaint was filed in August, 1881. It averred that in 1879 the plaintiff broke his leg and hired the defendant, as a surgeon, to set it and attend to it, who, in such employment, was so negligent and unskilful that the leg became crooked, its bones failed to unite, it was shortened two inches, the joints of the leg and foot became stiff and useless, so that the plaintiff, besides suffering needless pain, was made incapable of attending to his ordinary business, to his damage \$5,000.

The defendant answered by a general denial.

A jury gave the plaintiff a verdict for \$480. The record states that the verdict was rendered on October 1st, 1881, that being the twenty-fourth day of September term, 1881.

There was no motion for a new trial at that term. Under the civil code of 1852, sections 354 and 356, a motion for a new trial made after the end of the term at which the verdict was rendered was too late. *Greenup v. Crooks*, 50 Ind. 410.

Section 561 of the Revised Statutes of 1881 provides that "if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term," a motion for a new trial may be made "on the first day of the next term of such court, whether general, special, or adjourned."

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Wallace v. Ransdell.

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The present record does not show that the verdict was rendered on the last day of the session, or on the last day of the term, but this court takes judicial notice of the commencement and of the duration of the terms of the circuit courts. *Roberts v. Masters*, 40 Ind. 461; *Spencer v. Curtis*, 57 Ind. 221. We know judicially that the September term, 1881, of the Johnson Circuit Court began on the first Monday of September, and that the twenty-fourth day of that term was its last judicial day.

The present record, immediately after the statement of the verdict, is thus continued: "And afterwards, to wit, on the 21st day of November, 1881, the same being the first judicial day of the November term, 1881, of the Johnson Circuit Court," etc., "the following proceedings were had," to wit: "Come now the parties by their attorneys, and the defendant moves for a new trial of this cause and files reasons therefor as follows."

This motion was in time under section 561 of the R. S. of 1881. The motion was overruled, judgment was rendered on the verdict, and the defendant appealed.

The errors assigned are:

1. Refusing to give instruction No. 5, requested by defendant.
2. Giving instruction No. 3, requested by plaintiff.
3. Overruling the motion for a new trial.

Of these specifications of error the third is the only proper one. Busk. Prac. 244.

The reasons assigned for a new trial were:

1. Excessive damages.
2. That the verdict was not sustained by the evidence and was contrary to law.
3. Error of law occurring at the trial, 1st. In refusing to give to the jury instruction No. 5, requested by defendant; 2d. In giving to the jury instruction No. 3, requested by the plaintiff.

The objection to the refusal of instruction No. 5 is not

argued in the appellant's brief, and is, therefore, regarded as waived.

Instruction No. 3 was the following :

"If you find from the evidence that the defendant put the plaintiff's leg in proper place and dressed it, you should enquire what means, if any, were used by him to keep it in place and to guard against the effects of the ordinary and natural movements of the plaintiff and his muscles in his then condition. The responsibility of not providing such safeguards as were necessary and proper in the case rests with the defendant. You should also consider what directions or instructions were given by the defendant, or whether any directions or instructions were given, as to the duty of remaining quiet and not moving, or the dangerous results likely to follow from undue motion. The responsibility for not giving such instructions and directions as were necessary and proper rests with the defendant; and if such directions and instructions were necessary and proper, and he failed and neglected to give them, you will be justified in considering such failure as negligence and want of proper care and attention."

The objection to this instruction is stated in the appellant's additional brief as follows :

"What we complain of in the instruction we object to, is not that it is incomplete and does not state the facts fully, but that it states an erroneous principle of law.

"No man can read it without understanding that all but the first proposition in it was left to the judgment of the jury without reference to the evidence.

"The only thing which they were told they should find from the evidence was the fact whether the defendant put the plaintiff's leg in proper place and dressed it.

"It seems to us that the very fact that they are told that this fact must be found from the evidence, must necessarily lead the jury to understand that the other facts to be found as laid down in the instruction need not be based entirely upon

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the evidence, but might be based on the evidence, their common sense and private opinions."

This view of instruction No. 3 is not satisfactory. In this instruction, the court was indicating to the jury some of the matters to which their attention must be specially directed; the jury is told that if they find from the evidence that the leg was properly put in place, then they must "enquire" further and "consider" further certain other matters. The court had already told the jury, at the request of the defendant, that the burden of proof was upon the plaintiff, and that to enable him to recover they must find "that he has proven by a preponderance of the evidence, that the defendant treated the plaintiff's broken leg in a careless and negligent, or in an unskilful manner, and that the plaintiff has suffered all or some of the injuries charged."

The court had also told the jury, at the request of the defendant, "You must further find from the evidence that the injury or injuries which have resulted, if any have been proven, are the direct result of the negligent, careless or unskilful treatment given by the defendant." The court had also told the jury that the plaintiff could not recover, if it were proved that his own negligence contributed to the injury.

When, after giving such instructions, the court undertakes to point out some of the matters into which the jury must "enquire" and about which they must "consider," that is not in conflict with such instructions; the enquiry and consideration in such a case are necessarily in relation to the evidence, and the failure to repeat the preceding instructions in connection with each of the particulars alluded to can not mislead a jury, and does not intimate that they are to enquire and consider in reference to anything else than the preponderance of evidence as to such particulars.

There was no error in instruction No. 3, when taken in connection with the other instructions. It was proper to call the attention of the jury to the matters alluded to in said instruction No. 3. *Carpenter v. Blake*, 75 N. Y. 12, 19.

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The other reasons for a new trial are that the damages are excessive, and that the verdict was not sustained by the evidence and was contrary to law.

There was evidence tending to sustain the verdict; there was conflicting testimony, but in such a case this court will not disturb the verdict of a jury. *Weaver v. State*, 83 Ind. 289. The damages, \$480, were not excessive; the verdict was not contrary to law.

There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby in all things affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

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No. 10,538.

## BALDWIN v. FLEMING.

PRINCIPAL AND SURETY.—*Co-Sureties. — Contribution. — Presumption. — Evidence.*—In an action on a promissory note against the makers, it having been established that the last two of the four signers of the note were sureties thereon, it was

*Held*, that the presumption arose that said sureties were co-sureties, and were bound to contribution, but that such presumption might be overthrown by parol evidence, and the last signer might thus be shown to be, in fact, a surety for all the other makers.

SAME.—*Right of Surety to Fix His Liability.*—Where a promissory note has been signed by a surety and entrusted by him to a principal maker, who thereafter obtains the signature of another surety thereon, the latter surety has a right to determine for whom he will become surety, and to fix the nature of his liability as between himself and the prior makers; and by agreement, written or parol, express or implied, between him and said principal, the liability of said subsequent signer may be made that of surety for all the makers who have signed before him, without any agreement or communication between him and such prior surety or the payee, and without the knowledge of such prior surety, of whose suretyship said subsequent signer has notice when he signs.

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**SAME.**—*Affixing the Word "Surety."*—The addition of the word "surety" to his name by one who signs a promissory note after the signatures of other makers, without his specifying for whom of such prior signers he intends to become surety, will not alone rebut his implied promise to contribute as a co-surety with prior sureties on such note.

**SUPREME COURT.**—*Weight of Evidence.*—Before the Supreme Court can disturb the finding of the trial court upon a question of fact, it must be convinced that the conclusion reached was wholly unsupported by the evidence.

From the Warren Circuit Court.

*J. W. Sutton, J. McCabe and E. F. McCabe*, for appellant.  
*W. P. Rhodes and W. L. Rabourn*, for appellee.

**BLACK, C.**—In an action brought by William Cameron against Albert B. Baldwin, Ralph Baldwin, Silas Baldwin and Frank C. Fleming, on a promissory note, payable to said Cameron, dated November 23d, 1880, and signed by said defendants in the order in which their names are above set out, the word "surety" being affixed to the name of said Fleming, the last signer, the question of suretyship was presented by the pleadings as follows: Silas Baldwin, the appellant, by his cross complaint, alleged that he executed the note as surety for Albert and Ralph Baldwin. The appellee, by his cross complaint, which the appellant, by his answer thereto, denied, alleged that the appellee was surety for all the other makers of the note. Ralph, by his answers to these cross complaints, admitted that the appellant and the appellee were sureties on the note.

A return of "not found" as to Albert was suggested on the record.

The court tried the cause and found that Ralph was principal in the note, that Silas was his surety thereon, that, as to Fleming, Ralph and Silas were both principals, and that Fleming was surety on the note for both Ralph and Silas; and it was adjudged that the property of Ralph be first exhausted before proceeding against Silas, and that the property of both Ralph and Silas be first exhausted before proceeding against Fleming.

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Baldwin v. Fleming.

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A motion for a new trial, made by the appellant, was overruled, and this ruling is assigned as error. The only question before us is, whether the finding was sustained by sufficient evidence. The evidence may be stated in small space.

The appellee introduced the note and testified as follows: "The defendant Albert B. Baldwin asked me to sign the note in suit. I declined to do so, but told him I would if he would get his father, Silas Baldwin, on the note. He afterward brought the note to me with his father's name to it. I then signed the note. All the other parties had signed the note before I signed it. I think it was the day before that the others signed. When I signed the note, I signed as surety for all the other parties. I had no communication with any one about the note but Albert B. Baldwin. The note was given for a livery stable that Albert B. Baldwin and Ralph Baldwin were buying of William Cameron. That I understood when I signed the note. I did not know whether Silas Baldwin was one of the purchasers of the stable or not."

Ralph Baldwin testified: "I executed the note in suit as one of the principals. My brother, Albert B. Baldwin, was also a principal in the note. The note was given for a livery stable my brother and I bought of William Cameron. I and my brother Albert were the principals; we received all the consideration for the note. Silas Baldwin and Frank C. Fleming were sureties on the note. I was not present when Fleming signed the note."

The appellant testified: "Ralph Baldwin brought the note to me to go on it as security for him. He said Albert would get Fleming to go security on the note for Albert. I told Ralph to put my name to the note. I never received any part of the consideration for the note. The note was given for a livery stable bought by Albert B. Baldwin and Ralph Baldwin of William Cameron. I am only security on the note."

The appellant introduced in evidence a mortgage of an undivided one-half interest in a portable steam-engine and a separator, executed February 5th, 1881, by Albert B. and

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Ralph Baldwin, to the appellee, the condition therein stated being, "that, whereas the said Frank C. Fleming is surety for the said Albert Baldwin and the said Ralph Baldwin, wherein they are indebted to one William Cameron in the sum of six hundred dollars, by a promissory note," etc., describing the note in suit: "Now, if the said Albert Baldwin and the said Ralph Baldwin shall well and truly pay said note," etc. This was all the evidence.

The fact being established that both the appellant and the appellee were sureties on the note, the presumption arose that they were co-sureties, and bound to contribution. By parol evidence, this presumption might be overthrown, and the appellee might be shown to be, in fact, a surety for all the other makers. *Oldham v. Broom*, 28 Ohio St. 41, 48.

The appellee had a right to determine for whom he would become surety, and to fix the nature of his liability as between him and the other makers. By agreement, written or parol, express or implied, between the appellee and the principal entrusted with the note by the appellant after he had signed it, the appellee's liability might be made that of a surety for all the other makers, without any agreement or any communication between the appellee and the appellant or the payee, and without the appellant's knowledge. See *Oldham v. Broom*, *supra*; *Adams v. Flanagan*, 36 Vt. 400; *Sherman v. Black*, 49 Vt. 198; *Bowser v. Rendell*, 31 Ind. 128; *Bobbitt v. Shryer*, 70 Ind. 513.

The chattel mortgage was executed long after the execution of the note, and the appellant was not a party to it. It, indeed, contained nothing necessarily inconsistent either with the claim that the appellee was surety for all the other signers of the note, or the proposition that he was a co-surety with the appellant. It could not affect the question of the relation of the parties here in dispute.

If the appellee had notice that the appellant was a surety, this would not prevent the former from restricting his liability as he now claims to have done. The addition of the word "surety" to his name, without specifying for whom he became

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surety, would not alone rebut his implied promise to contribute as a co-surety with any prior sureties. That addition was not inconsistent with an understanding on his part that one of the prior signers was a surety and an agreement to be his co-surety. If he believed, and under the circumstances had a right to suppose, that all the prior signers were principals, the addition of the word "surety" to his name might, perhaps, be regarded, in connection with other facts, as a manifestation of an intention to become a surety for all the other makers. *Sherman v. Black, supra.*

The appellant signed the note in form as a principal, and entrusted it with one of the principals. The conversation between the appellant and Ralph, when the former authorized the placing of his name upon the note, does not appear to have been reported to the appellee, and he was not affected by it. There was no communication between the appellee and any of the parties except Albert.

The appellee had the burden of rebutting an equitable presumption, of contradicting an implied assumpsit. Whether he did so depends upon the proper construction to be placed upon what was said and done at the two interviews between him and Albert, considered together with the understanding in regard to the circumstances shown to have been had by him when he signed. He understood that the note was given for a livery stable which Albert and Ralph were buying of the payee. He did not know whether Silas was one of the purchasers or not; his understanding, however, appears to have been that Albert and Ralph were buying it, and this was true. He seems, from the evidence, to have signed with the belief that the consideration for the note passed to Albert and Ralph; Albert asked the appellee to "sign the note;" the appellee, in answer, said that he would do so if Albert would get the appellant "on the note." The next day after this conversation, the note was taken by Albert to the appellee with the appellant's name on it, and the appellee then signed it, adding the word "surety" to his name.

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Aside from the statement of the appellee as a witness, that he signed as surety for all the other parties, it seems that all that was shown to have been said and done was consistent with a purpose on the part of the appellee not to become a surety, unless the appellant would first go on the note as a surety, and an understanding on the part of the appellee that the appellant did become a surety, and consistent also with a presumption that the appellee signed as a co-surety.

But the question whether the appellee signed as surety for all the other makers was a question of fact, to be decided by the trial court according to the preponderance of the evidence before it. If there was any testimony tending to support the finding, we can not weigh the evidence for the purpose of determining the preponderance. The testimony is set out in form as above quoted. The appellee was cross-examined as a witness, but what questions were propounded to him or to the other witnesses we do not know. We can not pass upon the admissibility of any of the evidence. Whether there was any conversation, and if so, what was said when the appellee signed the note at the second visit of Albert, is not shown. But the appellee, without objection, testified that he signed the note as surety for all the other parties. This was the fact disputed by the appellant, who permitted the appellee to so testify without interrogating him as to what was said at the meeting at which the appellee signed the note.

We can not say that the court could not consider this statement of the appellee as a part of the evidence on which to base its finding. It must be regarded by us as evidence tending to sustain the finding.

We do not regard the case as free from doubt, but before we can disturb the finding of the trial court upon a question of fact, we must be convinced that the conclusion reached was wholly unsupported by the evidence.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

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Fisher v. Payne.

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No. 10,683.

## FISHER v. PAYNE.

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**CONVEYANCE.—*Infant Married Woman.—Interest in Husband's Real Estate.*—**

By the provisions of sections 2939, 2940 and 2941, R. S. 1881, a married woman less than twenty-one and more than eighteen years of age has been authorized to execute a valid conveyance of her interest in her husband's lands in this State, by uniting with him in a deed, with the consent of her father—if no father, with the consent of the mother, and if neither father or mother, with the consent of the circuit judge, to be manifested in accordance with the formalities of the statute.

**SAME.—*Disaffirmance.—Action to Recover Real Estate.—Complaint.*—**A complaint by such woman to recover her interest in the lands of her husband, conveyed by them in 1863, on the ground that after her husband's death, and after she attained full age, she disaffirmed such conveyance, is insufficient on demurrer, when it is not averred that such conveyance was made without the consent of father, mother or circuit judge.

From the Johnson Circuit Court.

*O. J. Glessner, E. K. Adams and L. J. Hackney*, for appellant.

*S. P. Oyler and W. A. Johnson*, for appellee.

**BEST, C.**—The appellant brought this action against the appellee to obtain partition of certain lands in the complaint described.

The complaint consisted of three paragraphs. Each averred, in substance, that on the 15th day of February, 1863, the appellant was the wife of Willis C. Fisher, who owned the undivided one-half of said lands, and on said day she joined him in the conveyance of the same to Willis T. Webb and William Needham; that at the time of such conveyance she was less than nineteen years of age, and that she continued the wife of said Fisher until the — day of July, 1880, when he died intestate; that the appellee is now in possession of said lands, claiming to own them, and that on the 23d day of February, 1882, she gave him notice in writing that she was an infant when said conveyance was made, and that she revoked and disaffirmed the same. Wherefore, etc.

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A demurrer for the want of facts was sustained to each of these paragraphs, and this ruling presents the only question in the record.

The appellant's claim to any portion of this land is based upon the assumption that her deed was voidable, and that her act of disaffirmance invalidated it. If her deed was not voidable, she is not entitled to recover any portion of the land, and hence it was incumbent upon her to aver such facts as show that she might avoid the deed. The only averment upon this subject is, that she was less than nineteen years of age when she joined her husband in the conveyance. This was not, in our judgment, sufficient. At the time this conveyance was made, the law empowered a married woman who was over eighteen years of age to join her husband in the conveyance of his land by the observance of certain formalities, and such conveyances are valid.

The statute then in force provided that any married woman more than eighteen and less than twenty-one years of age may convey her right to any lands of her husband sold and conveyed by him, by executing and acknowledging the execution of such conveyance, if the father, or in case there is no father, if the mother, shall declare before the officer taking the acknowledgment that he or she believes that such conveyance is for the benefit of such married woman, and that it would be prejudicial to such married woman and her husband to be prevented from disposing of such lands, which declaration, with the name of the father or mother, shall be inserted as a part of the certificate of the officer taking such acknowledgment. Section 2939, R. S. 1881.

If there is neither father nor mother living, such conveyance may be made by obtaining the assent of the circuit judge. Sections 2940 and 2941, R. S. 1881.

It will thus be seen that, at the time the conveyance in question was made, the law empowered a married woman more than eighteen years of age to join her husband in the conveyance of his land, and when executed by her in accordance

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with the statute, the conveyance was binding, and could not afterwards be disaffirmed by her. It was incumbent upon her, as before remarked, to show that her deed was voidable. The averment is that she was less than nineteen years of age, and hence the inference is that she was more than eighteen. Being more than eighteen, the law enabled her to make a valid conveyance of her right in her husband's lands by joining him therein with the consent of father, mother or circuit judge. The averment is that she joined her husband in the conveyance, but she does not aver that this was done without the consent of father, mother or circuit judge. This must be done in order to show that the deed is voidable. *State, ex rel., v. Witz*, 87 Ind. 190.

The averment that a married woman, more than eighteen years of age, joined her husband in the conveyance of his lands in this State in 1863, does not show that such conveyance is voidable, and, therefore, each paragraph of the complaint was insufficient, and the demurrer was properly sustained. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

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 No. 10,534.

## WISEMAN v. BECKWITH.

VENDOR AND VENDEE.—*Constitutional Law.—Contract, Obligation of.—Vested Rights.*—The obligation of an executory contract to convey land gives to the vendee the vested right to a conveyance of such title as the vendor had when the contract was made, and any subsequent legislation which diminishes such title, and thereby puts it out of the vendor's power to perform his contract, impairs its obligation, and is therefore void.

SAME.—*Widow.—Dower.—Conveyance.—Stare Decisis.*—A., when the statute gave the wife dower, contracted to convey lands to B., and made conveyance after the statute had given the wife one-third in fee, she not joining in the conveyance.

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*Held*, that, upon the death of A., his widow was not entitled to a third in fee. *Held*, also, that *Strong v. Clem*, 12 Ind. 37, and subsequent cases, holding that in such case the widow is not entitled even to dower, have established a rule of property which can not now be questioned.

From the Hamilton Circuit Court.

*T. J. Kane* and *T. P. Davis*, for appellant.

*D. Moss* and *R. R. Stephenson*, for appellee.

MORRIS, C.—The appellant sued the appellee for the partition of certain real estate situate in Hamilton county, Indiana. The appellant alleges in the complaint that she was married to one John Wiseman in the year 1828, and remained his wife until his death, which is alleged to have occurred in the year 1876; that her said husband, John Wiseman, was, during said marriage, seized in fee of the southwest quarter of the northeast quarter of section 7, township 18, range 6 east, in Hamilton county, Indiana; that in the year 1854 her husband conveyed said real estate to one Sherwin P. Jones; that, by intermediate conveyances, the title conveyed by her said husband to said Jones passed to the appellee. It is averred that the appellant did not join with her husband in the conveyance of said land to said Jones nor to any one else; that, as the surviving widow of the said John Wiseman, she is the owner of one-third of said real estate in fee, and that the appellee is the owner of two-thirds as the remote grantee of said John Wiseman; that they, the appellant and appellee, hold said land as tenants in common. Partition is prayed.

The appellee answered in one paragraph, in which he alleges that, on the 15th day of April, 1853, said John Wiseman, then in life, but since deceased, bargained and sold the land described in the complaint to Sherwin Jones for the sum of \$1,000; that at the time he made said sale said Wiseman gave said Jones a title-bond, binding himself to convey said land to him on the payment of said purchase-money; that said Jones immediately after making said purchase, and in pursuance thereof, took possession of said land, and made lasting improvements thereon of the value of \$1,000; that

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afterwards, during the year 1854, the said John Wiseman, in pursuance of the terms of said contract, conveyed said lands to the said Jones; that one Elizabeth Wiseman, who then lived with the said John Wiseman, and whom he recognized as his wife, united with him in the execution of said deed; that Jones conveyed the land to one Whitsel, who conveyed the same to one Stephens, who conveyed to the appellee; that Jones bought, paid for, took possession of, and made improvements on said land in good faith, without any knowledge of the fact that the appellant was, or ever had been, the wife of the said John Wiseman; that his possession and that of his grantors was continuous, uninterrupted, exclusive and adverse to the petitioner and all others for more than twenty years prior to the death of the said John Wiseman, and until the commencement of this suit. Wherefore, etc.

The appellant demurred to the answer. The court overruled the demurrer. The appellant elected to stand by her demurrer, and final judgment was rendered for the appellee.

The appellant insists that the court erred in overruling the demurrer to the answer, and this is the only error assigned.

At the time John Wiseman is alleged to have sold and given the possession of the land to the said Jones, he owned the same in fee, subject only to the inchoate right of the appellant to one-third of the same for life, in case she should survive him. John Wiseman could sell the title and all the interest he then owned in said land. By such sale the purchaser would become the equitable owner of the interest of his vendor, and being in possession, upon the payment of the purchase-money, he would be entitled, by his contract of purchase, to a conveyance of the right and title which his vendor had at the time of the purchase. By the contract of purchase, Wiseman was bound to transfer to the purchaser all the title to, and interest in, the land which he had at the time of the sale and purchase. The obligation of the contract required this. Any subsequent legislation, which attempted to take from Wiseman the title which he had at the time the

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contract was made, and give it to another, thereby disabling him from performing the contract, would impair its obligation. For the law existing at the time of the making of a contract, silently entered into it, and constituted one of its terms, and this law determined the measure of its obligation.

In the case of *McCracken v. Hayward*, 2 How. 608, the court say: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all State legislation which impaired the obligation, it was left to the States to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

In this case, by the contract, the duty of Wiseman was to convey the title which he had in April, 1853, to the land in controversy to Jones, and the right of Jones was to have such title. If the law of 1852, which took effect May the 6th, 1853, is held to give the appellant one-third of the land

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in fee, it necessarily affects the duty of John Wiseman, as defined by his contract of sale, and it manifestly impairs the rights of Jones as the purchaser. The law of 1852 can not, therefore, have this effect without impairing the obligation of the contract by which Wiseman sold and agreed to convey to Jones.

But, for another reason, the law giving the widow one-third in fee of the land of which her husband was seized during coverture, and in the conveyance of which she has not joined, can not apply. Before that law took effect, according to the averments of the answer, Jones had a vested interest in the land. That interest could not be disturbed or affected, or in any way diminished, or in any degree divested, by subsequent legislation. If Jones, by his purchase, had or secured a vested interest in this land, it will hardly be pretended, in view of the decisions of this court, extending from 1857 to the present time, and the decisions of the courts of other States, that such interest could be diminished by subsequent legislation. *Strong v. Clem*, 12 Ind. 37; *Noel v. Ewing*, 9 Ind. 37; *Taylor v. Sample*, 51 Ind. 423; *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, 48 Ind. 367; *Bowers v. Bowers*, 53 Ind. 430.

Judge Cooley, in his work on Constitutional Limitations, p. 357, says:

“ But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. \* \* \* No reason of general public policy will be sufficient, it seems, to validate such transfers when they operate upon existing vested rights.”

It is upon this principle that the foregoing cases rest, and we think they are not liable to just criticism.

By the contract, Jones became the equitable owner of the title and interest of John Wiseman in and to the land in controversy; he was the equitable owner of the land, subject only to the inchoate dower right of the appellant. To hold that by

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the law which took effect May the 6th, 1853, the appellant held an inchoate interest in fee to one-third of the land, would be taking something from Jones and giving it to the appellant for her private use. This can not be done.

Pomeroy, in his work on Equity Jurisprudence, says:

"In truth the vendee becomes the equitable owner of the land and the vendor the equitable owner of the purchase-money at once, upon the execution of the contract, even before any portion of the purchase-money is paid." Pom. Eq. Juris., section 368.

In defining what constitutes a vested right, Judge Cooley says: "It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another." Const. Lim. 359.

According to this definition, the correctness of which will not be questioned, it is quite clear that by the contract of sale Jones had a vested right to and in the land in controversy, a right to have transferred to him, upon the payment of the purchase-money pursuant to the terms of the contract, the title to the land in fee, subject only to the life-estate of the appellant to one-third of the same, if she survived her husband, and it is equally clear, we think, that this right could not be disturbed by subsequent legislation.

But the contract of purchase and the rights of Jones and the appellee, as his grantee, would not be in any way disturbed by giving to the appellant the right to one-third of the land from the death of her husband during her life. To do this would be neither an invasion nor a diminution of the rights of Jones.

But dower was abolished by the law of 1852. The right of dower, being but an expectancy during the life of the husband, was subject to legislative control. Cooley Const. Lim. 359; *Strong v. Clem*, *supra*.

Though dower was abolished in 1853, after the contract of sale was made in this case, still, may not the appellant, as the

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widow of John Wiseman, take, under the law which gives her a third in fee, a less estate? Does it follow that because of the sale made by her husband she can not take a fee without disturbing vested rights or impairing the obligations of a contract? She can not take a less estate than a fee, though such less estate might be taken without interfering with vested rights or impairing the obligations of a contract. The writer of this opinion can see no reason why the appellant might not, under the law of 1852, take such less estate—why the law should not be operative as far as it can operate without disturbing vested rights or impairing the obligations of contracts. The case before us must, it would seem, have been within the contemplation of the law-makers of 1852, and it may be fairly assumed that the reason why it was not specifically provided for was because it was intended that the widow, under the provisions made, could take less than a fee, where, by reason of contracts made before the law took effect, she could not obtain the fee. But the decisions referred to settle the question the other way. It is obvious that in the case of *Strong v. Clem*, *supra*, and the other cases referred to, the widow, not having joined in the conveyance, might have taken a life-estate in the land in controversy without invading the vested rights of the purchaser or impairing the obligations of the contract of purchase. The court held, however, that she was not entitled to even a life-estate. The question, it is true, does not seem to have been discussed by the court, but the rule established has been acquiesced in as the law for many years, and the appellee, for any thing that appears in the record, may have purchased the land in controversy in reliance upon these cases. The rule thus established has become one of property, and it is now too late to question it. We conclude that the court did not err in overruling the demurrer to the appellee's answer.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

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Hebron Gravel Road Company v. Harvey.

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No. 9509.

## HEBRON GRAVEL ROAD COMPANY v. HARVEY.

WATERCOURSES.—*Definition of.*—*Obstruction.*—*Damages.*—*Surface Water.*—

A lake fed by streams, the waters of which in times of flood find exit by rapid percolation through a bed of gravel, so that there is a sensible current towards the gravel bed, is a running stream, and not merely surface water, and one who obstructs the flow to such place of discharge, and thereby causes the water to overflow the lands of another, is liable for the consequent damages.

From the Superior Court of Tippecanoe county.

*R. C. Gregory and W. B. Gregory*, for appellant.

*R. P. Davidson and J. C. Davidson*, for appellee.

BICKNELL, C. C.—This was an action by the appellee against the appellant to recover damages.

The complaint averred, in substance, that the plaintiff owned land adjacent to a large stream of running water called Headly's lake, which had its outlet over low grounds and through a gorge eastward to Burnett's creek, and did not overflow the plaintiff's land; that in 1868 a former company built a gravel road, and made an embankment across said low grounds and gorge, and put under it an insufficient culvert; that afterwards, the defendant became the owner of said gravel road, and removed the culvert and raised the embankment, so that it confined the waters of said lake, whereby the waters were thrown back upon ten acres of the plaintiff's arable land in times of heavy rainfalls, and the plaintiff's crops were destroyed, to his damage, \$600.

A demurrer to this complaint, for want of facts sufficient, was overruled.

The defendant answered by a general denial. The issue was tried by a jury, who found for the plaintiff, with \$220 damages. Judgment was rendered upon the verdict over a motion for a new trial by the defendant, and the defendant appealed.

The errors assigned are the following:

90	199
138	616
90	199
142	614

90	192
155	233
90	192
163	237

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1. Overruling the demurrer to the complaint.
2. Overruling the motion for a new trial.

The reasons alleged for the new trial were :

1. That the verdict is not sustained by sufficient evidence.
2. That the verdict is contrary to law.
3. Error in giving instructions asked by the plaintiff, numbered 1, 2, 3, 6, 7, 8 and 9, and in giving instructions Nos. 5 and 11 as modified, and in refusing to give instructions asked by the defendant numbered I and IV.

The appellant in his brief does not discuss separately any of the errors assigned. He says: "The three questions presented, 1st, The want of facts sufficient in the complaint; 2d, The want of sufficient evidence; 3d, Error of the court in the charge to the jury, will be presented together."

But he points out no particular defect in the complaint, nor does he call our attention to any specific error in the instructions, and although he refers to certain testimony as tending to show that the water thrown back upon the plaintiff's land was merely surface water, he does not show that there was no testimony tending to sustain the verdict. The real question in controversy is this: Was the body of water called Lake Headly a running stream, or was it mere surface water? The law is well settled in Indiana that for obstructing a natural watercourse an action will lie, *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135), but a land-owner has a right to ward off surface water from his own land. *Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278 (38 Am. R. 139); *Taylor v. Fickas*, 64 Ind. 167 (31 Am. R. 114); *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. R. Co. v. Houry*, 77 Ind. 364. The complaint does not show that the body of water obstructed was mere surface water. It states that it was a large stream of running water, having its outlet over low grounds and through a gorge eastward to Burnett's creek, and that such outlet was obstructed by an embankment built across said low grounds and gorge.

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There was no error in overruling the demurrer to the complaint.

In the case of *Taylor v. Fickas*, *supra*, this court said: "The true doctrine in such a case, we believe, was expressed by the CHANCELLOR in the case of *Earl v. DeHart*, 1 Beasley, 280: 'If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse.'" This language was also quoted with approval in the subsequent case of *Schlichter v. Phillipy*, 67 Ind. 201.

Upon this subject the court instructed the jury as follows:

"If you find from the evidence that the so-called Lake Headly is and was from time immemorial a natural body of water, fed and supplied by natural watercourses flowing into it upon its sides; that, like other streams, it had its stages of high and low water; that in its stage of ordinary high water it extended, by its natural flow, considerably beyond and to the northward of what is now the embankment of the gravel road; that, by reason of its such extension northeastward, its waters, before the erection of the embankment, rapidly subsided, and thereby the plaintiff's lands were saved from injurious inundation, then, upon such facts (if so found), it was the right of the plaintiff as against the defendant (whatever may have been the rights of others), to have the waters of said lake continue to flow in their natural course, and the builders of the gravel road, whether the defendant or a former company, had no right to obstruct the said flow, to the plaintiff's damage, without first having obtained from him the right to do so."

The court also gave the jury the following instruction:

"If you find from the evidence that the so-called Lake Headly, at and before the time of the building of the embank-

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Hebron Gravel Road Company v. Harvey.

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ment complained of, was a natural body of water, about a mile long by a quarter of a mile or so wide, commencing with a point or apex at its west end adjacent to the northwest corner of the plaintiff's land, and extending first in an easterly and then in a northeasterly course, and terminating north of the embankment in question ; that it was supplied and fed by several streams putting into it from its north and south sides ; that its waters were rapidly changed and drawn off by percolation ; that the percolation or passage of the waters at its northeast end, through an extensive field of sand and gravel, was so great as in times of fullness to reduce its waters with unusual rapidity ; and if you find that the percolation of the waters at its northeast end was so great as to create a drawing or movement of the waters to that end, though imperceptibly to ordinary observation, then upon such a state of facts, if so found to have existed, the said lake was within the meaning of the law a watercourse. A watercourse usually empties or debouches into some other stream or body of water, but not necessarily so. It may sink into a cavity or be taken down by rapid percolation."

The court also gave the jury the following instruction :

"If Lake Headly was a natural body of water lying in a natural basin, extending over the lands of others, but not extending over the land of the plaintiff, being constantly fed and supplied by living streams, the owners of the lands upon which it was might (so far as any question here appears) have drained or abated the lake, if they could have done so without injury to others, but they could not get clear of it upon their own lands, by diverting it upon the lands adjacent of others, and what they could not do the defendant could not do. If they could not abate it without injury to others, then the law requires them to endure what the arrangements of nature have made remediless."

The court, at the request of the defendant, gave the jury the following instruction, after reciting the allegations of the complaint :

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"This complaint is for obstructing the flow of a running stream of water; to constitute such a running stream or water-course for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it need not flow continually; it may sometimes be dry; it must flow in a definite channel, having a bed, sides or banks, and must usually discharge itself into some other stream or body of water; it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary cause; it does not include the water flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from higher to lower land, but which at other times are destitute of water, such hollows or ravines are not, in legal contemplation, 'watercourses,' for the obstruction of which an action will lie, and if you believe from the evidence in this cause that the only overflow of the waters of Lake Headly in a northeasterly direction was occasioned by extraordinary freshets, causing the water to flow over the high ground at the northeast end of the lake, then that was not a watercourse within the meaning of the law, and then it would be your duty to find for the defendant."

These instructions were appropriate to the evidence, and fairly pointed out the distinction between a permanent water-course and mere surface water.

There was evidence tending to show that the northern part of the bottom of Lake Headly was a bed of porous gravel and sand extending beyond the site of the present embankment, at ordinary high water, and that through this bed the water passed down with such rapidity as to create a continual current from the southwest to the northeast, and that this was always so until the making of the embankment prevented the waters from flowing in their accustomed course, and threw them back upon the plaintiff's land. The evidence showed that the lake was fed by living streams, and whether the water passed away by an outlet on the surface of the ground, or fell

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into a cavern at the north end, or went downward more slowly through a bed of gravel at the north end, such passage would still be the natural channel of the current, which the defendant would have no right to obstruct.

As already stated, the appellant has pointed out no specific defect in any of the instructions; the general objection seems to be that here was a case of mere surface water, and, therefore, the instructions given and refused were wrongly given or refused. Under such a general presentation, we are not required to repeat here the remaining instructions. We think there was no error in giving or refusing the instructions; and we think there was evidence fairly tending to sustain the verdict of the jury. We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The petition states that Lake Headly “is in no sense a running stream, and is without known channel or course on the land on which the appellant’s road is built,” and that “it is a collection of water supplied by surface water and the overflow of Indian creek.” But the question as to Lake Headly was fairly submitted to the jury.

The difference between a permanent watercourse and mere surface water was distinctly pointed out by the court below, in its instructions copied in the principal opinion, and the jury were plainly told that they should not return a verdict for the plaintiff unless they should find from the evidence that the so-called Lake Headly was not mere surface water, but was, and had been from time immemorial, a permanent watercourse such as the court in its instructions described.

There was evidence tending to show that Lake Headly was a permanent watercourse, fed by several streams, with a natural channel, which its waters, when high, always took, and

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pellant, and against the appellee Heller, upon such note; that after the judgment of dismissal, and while said appeal was pending in this court, the appellee Heller commenced another action upon said note against said Marsh and this appellant in the Hancock Circuit Court; the venue was changed to the Henry Circuit Court, and a judgment recovered against said Marsh and this appellant for the full amount of said note and interest; that since the rendition of the judgment in the Hancock Circuit Court in favor of appellant and against the appellee Heller, as directed by this court, said Heller has caused an execution to issue upon the judgment recovered against the appellant by him before that time in the Henry Circuit Court, has placed the same in the hands of the appellee William H. Thompson, sheriff of Hancock county, who is threatening to sell the property of appellant, and unless restrained will do so, to the great injury and damage of the appellant.

Do the facts thus stated entitle the appellant to the relief sought? It is well settled that a court of equity will restrain proceedings upon a judgment at law, where its enforcement is against conscience, and the same has been recovered by an unfair advantage. Wherever, by accident, mistake, fraud or otherwise, an unfair advantage has been obtained in proceedings at law, and it is against conscience to make use of such advantage, a court of equity will restrain the party from making use of the same; and after judgment any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not avail himself in defence of the suit, will authorize the court to interfere by injunction and restrain the party from enforcing the judgment. These are familiar principles, and are not questioned by the parties to this controversy.

The appellee, however, insists that the facts averred do not show that the collection of the judgment will be against conscience. This position is based upon the assumption that this court must enquire into the merits of the defence originally

interposed to the action upon the note, and it is insisted that since one judgment was rendered for and the other against the appellant, it does not appear that the collection of this judgment will be against conscience. If the solution of this question depended alone upon such enquiry, the appellee's position would be unanswerable. It does not, however, as we think, depend upon such enquiry, but upon the legal consequences growing out of the recovery of the judgment in the first action. That judgment can not be ignored, as it furnishes the controlling element in determining whether or not the collection of this judgment is against conscience. If that judgment is to be regarded as fixing the rights of the parties, it shows that the appellant has a complete defence to the action in which this judgment was recovered. The facts alleged in defence of the action first instituted upon said note show a valid and meritorious defence, and the finding of the court established the truth of such defence. This finding was not set aside in any mode known to the law, and so long as it remained in force it entitled the appellant to a judgment which, when rendered, constituted a complete defence to an action upon the note. The judgment thus rendered fixed the fact that the appellant had a complete defence, and this fact must be regarded as an existing one from the time the finding was made. For this purpose, the judgment must be deemed, by relation, to speak from that time, and thus to establish the fact that the appellant had a complete defence before the second suit was brought upon said note. In this way only can full effect be given to an adjudication between these parties upon the precise matter in dispute which was final, and, in point of time, was prior to the action in which the judgment now sought to be enjoined was rendered. The fact that the appellee Heller, subsequent to the time the court made its finding in favor of appellant, commenced another action upon said note and recovered a judgment against him, can not affect this conclusion. The appellant had the right to insist that a judgment should be rendered upon the finding, and,

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when rendered, it conclusively established the fact that the cause of action upon which the appellee's judgment had been rendered was merged in the appellant's judgment. This fact is utterly inconsistent with the notion that the appellee's judgment has any support in equity and good conscience. The finding did not, it is true, prevent him from maintaining another action upon the note, yet he could not, by pressing such action to judgment at a time when the appellant's defence was unavailable, escape the consequences flowing from the rendition of a judgment upon the finding. The institution of the second suit and the recovery of the judgment proceeded upon the assumption that no judgment would follow the finding in the first action. The validity of the judgment necessarily depended upon such contingency. This must be so in the very nature of things; otherwise we have two judgments based upon the same alleged cause of action, one in favor of and the other against its existence. This can not be; one or the other must give way, and as the action in which the appellant's judgment was recovered was first instituted and determined, it must, according to all the analogies of the law, fix the rights of these parties though judgment was not in fact entered until judgment was recovered in the action subsequently instituted. It thus appears that the appellant has a complete defence to the action in which this judgment was recovered, and that it would be inequitable to permit its collection. This defence was not available during the pendency of the second action, for the reason that no judgment had been entered upon the finding. The finding itself constituted no bar, and hence the appellant was unable to avail himself of the defence that now exists. *Walker v. Heller*, 73 Ind. 46.

The fact that the appellant has a good defence, and that it was not available, entitles him to an injunction restraining the appellee from collecting the judgment. This is a general rule, and is well supported by authorities. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Duncan v. Lyon*, 3 Johns. Ch. 351; *Foster*

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v. *Wood*, 6 Johns. Ch. 87; *Miller v. McCan*, 7 Paige, 451; *Hibbard v. Eastman*, 47 N. H. 507, and authorities there cited.

None of these cases are precisely like this one, but all assert the general doctrine within which the facts bring this case.

In *Miller v. McCan*, *supra*, it was held that a surety, who had been discharged by reason of the fact that the payee of a note had extended the time of payment without his consent, might enjoin the collection of a judgment recovered against him, on the ground that he was ignorant of his defence, and had no means to compel a discovery at law.

In *Hibbard v. Eastman*, *supra*, it was held that a defendant in a foreclosure proceeding who had transferred a note to the mortgagee in consideration that he would not take a personal judgment against him, could enjoin the judgment, for the reason that his defence, which was in the nature of an agreement not to sue, was not available in the action of foreclosure.

These cases are very analogous, and in principle fully support the conclusion we have reached.

The appellees also insist that the failure of the appellant to move to stay proceedings in the second action until this court determined the appeal in the first was such negligence as precludes him from maintaining this action. Several cases have been cited in support of this position, but upon an examination we find none of them in point. In all of them the party had an available defence, and it was held that his omission to make it was such negligence as precluded him from obtaining injunctive relief. This rule is familiar, and is supported by any number of adjudged cases. The proposition that a failure to move for a stay of proceedings is such negligence as prevents relief by injunction is quite different. It is new. No text-writer has asserted it, and no case has adjudged it so far as we are advised. Many cases can be found holding that where a party has a defence and fails to make it, or where the relief sought could have been obtained in the action at law

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by motion, appeal or otherwise, no relief will be granted by injunction staying proceedings after judgment; but we know of no case which holds that a failure to ask for a stay of proceedings, until pending litigation on a collateral matter may result in a judgment which when rendered will constitute a complete defence to the action, constitutes such negligence as bars relief from the judgment by injunction, nor do we think, upon principle, that such is the rule of law. The rule that requires a defendant who has a defence to make it rests upon very different reasons. The institution of the suit is a challenge to him to bring forward all the defences he can assert, and the verity accorded to judicial proceedings requires that all matters that enter into the controversy shall be deemed forever at rest. The opportunity thus afforded him to make his defence imposes the duty upon him, and his failure to avail himself of the opportunity is such negligence as precludes him from obtaining relief by injunction. The plaintiff who has furnished the defendant an opportunity of making his defences is also entitled to rely upon the judgment as a final adjudication of all such matters, and can not be again required to controvert them. These are some of the reasons which support the rule in question. They do not, however, lend any support to the notion that it was the duty of the appellant to move to stay proceedings. Such suit did not furnish him any opportunity to make his defence, and the appellee had no right to rely upon the judgment thus recovered as a final adjudication. The appellant owed him no duty, and hence was guilty of no negligence. The appellee knew the facts, and proceeded at his peril. He pressed his suit to judgment in violation of a right the appellant could not assert, and he can not now insist upon an unfair advantage which he should not retain simply because he was not prevented from taking it.

The appellee, however, insists that this question was settled adversely to the appellant in *Walker v. Heller*, 73 Ind. 46. The court in that case said that if a proper application had been made for a stay of proceedings, the appellant would

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have been entitled to it. This may be conceded, but it does not therefore follow that an omission to make such application will prevent him from obtaining relief by injunction after judgment. The court neither decided nor intimated anything of the kind, and, as no such question was involved, it was, of course, not decided. The case, therefore, is not an authority upon this point.

For these reasons, we are of opinion that the complaint was sufficient, and for the error in sustaining the demurrer to it, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, at appellees' costs, with instructions to overrule the demurrer to the complaint, and for further proceedings.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

No. 9182.

NAVE ET AL. *v.* FLACK.

**NEGLIGENCE.—Complaint.—Liability of Trader.**—A complaint, alleging that the defendant was a dealer in grain, having a warehouse for the storage thereof, with a drive-way thereto and therein by which his customers might reach a place for discharging grain into such warehouse, which way was a passage so dark that defects could not be seen, and which was negligently kept by the defendant in a dangerous condition; that the plaintiff was ignorant thereof, and, having sold to the defendant a load of grain, attempted to obey the defendant's direction to pass the same with his team along the way, and was, without his fault and wholly by reason of the dangerous condition of the way, crushed and injured, is good on demurrer.

**SAME.—Business Place.—Approaches.**—A trader is bound to maintain in a reasonably safe condition the approaches to his premises which are intended for the use of his customers, and a breach of this duty, resulting in injury to a customer who is himself free from fault proximately contributing thereto, gives a right of action.

**SAME.**—If the way was really dangerous, the fact that many others had used it without injury was immaterial.

90	205
127	408
90	205
130	62
90	205
132	341
90	205
143	429
90	205
146	437
90	205
148	174
149	73
152	671
90	205
164	407

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**SAME.—Definition of "Accident."**—The word "accident," in a restricted sense, means an injury to which human fault does not contribute, but it is also used to designate occurrences arising from carelessness.

**SAME.**—In such case, mere contribution by the plaintiff to the injury will not bar the right of action, and in the case stated it was not negligence on the part of the plaintiff to drive upon the way unless he had knowledge of the danger of doing so.

**SAME.—Contributory Negligence.**—Contributory negligence bars the plaintiff's right of recovery only where it is a proximate, and not a remote, cause of the injury.

**SAME.—Knowledge of Defect in Drive-Way.**—Mere knowledge by the plaintiff that a way is dangerous will not prevent a recovery for injury resulting from an attempt to use it, unless the danger be so great that a person of ordinary prudence would not voluntarily encounter it.

**EVIDENCE.—Admissions.—Admissibility.**—Evidence which legitimately tends to prove an admission by the defendant of a single fact which helps to make the plaintiff's case, may be admitted without error.

**SAME.—Order of Proof.—Discretion.**—The admission of evidence in rebuttal, which is only proper in chief, is not available error.

**SAME.—Practice.—Supreme Court.**—Unless specific objection to evidence be stated when the objection is made, no question in the Supreme Court can be made upon a ruling admitting it.

From the Tippecanoe Circuit Court.

*M. Milford, R. C. Gregory, W. B. Gregory, J. R. Coffroth, T. A. Stewart, J. E. McDonald, J. M. Butler, A. L. Mason and J. E. Schoonover*, for appellants.

*W. C. Wilson and J. H. Adams*, for appellee.

**ELLIOTT, J.**—The appellee's complaint alleges that the appellants were dealers in grain; that for the purpose of carrying on their business they had constructed scales for weighing wagons loaded with grain, a warehouse for receiving and storing grain, and had prepared approaches to their scales and warehouse; that they invited persons to sell them grain, and held out this invitation to the public generally; that the appellants carelessly and negligently permitted to be constructed and used an insecure drive-way, and failed to light the same, although it was the only way in which the scales and warehouse could be reached with wagons and teams, and afforded the only mode of access for persons delivering

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grain to the appellants; that on the 23d day of September, 1878, appellee brought to the appellants a wagon loaded with corn, drawn by two horses; that the grain was bought by them, and that by the direction of the appellants the appellee drove his team and wagon upon and along the drive-way for the purpose of unloading the corn; that being ignorant of the dangerous condition of the drive-way, and being directed to go on by the appellants' agent, he drove along the way; that it was dark, narrow and with but little space between the floor and ceiling; that after passing partly along the drive-way there was an elevation in the floor, bringing nearer together the floor and ceiling; that the change in the level of the way was not visible or easily discoverable, for the reason that the way was dark; that in passing over said way, and without fault on his part, but wholly through the negligence of appellants, appellee was caught between the timbers of the ceiling of the warehouse and drive-way and seriously injured.

We have no doubt of the sufficiency of this complaint.

A man who invites others to deal with him, and provides a place where persons may deliver articles bought by him, is bound to use reasonable care to make and keep the approach to such place in a reasonably safe condition for use for the purposes for which it was intended. 1 Thomp. Neg. 307. A dealer owes a duty to make reasonably safe all the approaches to his premises which are intended for use by his customers, and a breach of this duty will supply one who is injured, without his negligence contributing, with a cause of action. This duty is, however, owing only to those who go upon the premises by express or implied invitation, and does not extend to mere intruders. *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323; S. C., 41 Am. R. 572; *Everhart v. Terre Haute, etc., R. R. Co.*, 78 Ind. 292; S. C., 41 Am. R. 567.

A man is not guilty of contributory negligence who acts upon the direction of the servants of the owner of the premises, and proceeds along a way which is maintained as an approach to the premises, unless he knows or has reason to believe

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that the way is unsafe. It is averred in the complaint before us that the plaintiff had no knowledge of the unsafe condition of the drive-way, and that he proceeded upon it under the direction of appellants' servant, and, as under these circumstances he was warranted in acting upon the directions given him, he was not guilty of negligence. *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381, and authorities cited; Wharton Neg., section 352.

In cases where there is nothing to warn of danger, and nothing to indicate that a duty has not been discharged, a person to whom the duty is owing has a right to act upon the presumption that it has been performed. Of course, persons must always make use of their natural faculties; and not go carelessly or heedlessly into danger; but, while this is true, it is also true that they are not bound to do more than exercise ordinary care, and ordinary care does not require that one should anticipate a violation of duty and provide against its consequences. In this instance, the duty of the appellants was to maintain the approach provided by them for the use of their customers in a reasonably safe condition for use for the purposes for which customers were given, either expressly or impliedly, to understand it was intended, and, as there were no appearances of danger and no indications of neglect of duty, the appellee was justified in presuming that the duty had not been neglected, and that the drive-way might be safely used.

It is not only common carriers and persons engaged in business of a kindred nature that are bound to provide safe means of ingress and egress to the places to which they invite, either by express words or fair implication, persons to come and deal with them, but this duty extends to persons engaged in general mercantile business, as merchants, grain dealers, and the like. There has been some discussion as to whether this duty is owing to mere guests, but there seems to be no difference of opinion upon the proposition that this duty is owing to all who are invited to come to the premises on business. It would be a reproach to the law, if it permitted a business man

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to invite others to come to his premises for his own benefit and yet permit him to maintain the way by which the customer must come and go, in an unsafe condition. Shearman & Redf. Neg., section 499a; *Sweeny v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; 1 Thompson Neg. 283; Wharton Neg., sections 824a, 826; *Bennett v. Railroad Co.*, 102 U. S. 577.

In the twelfth instruction given by the court, the jury were fully instructed that they were to determine as questions of fact whether the place where the injury occurred was or was not dangerous, and whether appellants had or had not notice of the dangerous condition of the place, and that the fact that others had passed it in safety did not tend to disprove the fact, should the evidence show it to be the fact, that the place was actually dangerous. We approve this instruction. If the place was actually dangerous, then the fact that others had used it and escaped unhurt would not relieve the appellants from liability. The ruling question was whether the place was in truth dangerous, and if it was shown to be so then the fact that others had used it in safety would not change its character, nor deprive the appellee of his right to redress. A place proved to be unsafe may have been used without harm, but because this has been done does not alter its actual condition. Men may and do use unsafe places without receiving injury, but this does not show that a place proved to be really dangerous is not so.

The third instruction asked by the appellants is as follows: "If the jury find from the evidence that the place where the plaintiff received the injury he complains of had been used by the defendants for many years as a drive-way to receive wagon loads of corn containing as large and larger quantities of corn than the load on which the plaintiff was hurt, and that several hundreds of thousands of bushels of corn had been hauled into the defendants' warehouse through said drive-way and nobody was injured, and that no complaint had ever been made to defendants or either of them, nor had they, or either

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of them, ever heard said drive-way called of not sufficient height by any body, nor had notice thereof, and plaintiff was hurt in said drive-way in the manner he complains of in his complaint by accident, then the plaintiff can not recover."

The court did right in refusing this instruction. If the place was in reality dangerous, and the appellants were negligent, they are liable although the dangerous place may have been much used. The instruction makes the case turn upon the safe use by others, not upon the actual condition, and in this is erroneous.

It is contended that the word "accident" qualifies the instruction and makes it correctly express the law. We do not think so. A pure accident, where there is an absence of negligence, will not supply a cause of action, but where the accident is attributable to the negligence of the defendant, it is otherwise. *Shearman & Redf. Neg.*, section 5. The poverty of language compels the use of words in different meanings, and this is notably true of the word "accident." Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men. *Browne Jud. Interp.* 4. The use of the word "accident" does not save the instructions before us.

The fourteenth instruction given by the court is as follows: "Mere contribution to the injury does not necessarily preclude the right to recover for it. It was not contributory negligence for the plaintiff to drive upon the drive-way, unless he then had actual knowledge of its alleged dangerous or defective condition, or might have had such knowledge by the use of due care and prudence, and by the exercise of his senses and faculties. He had a right, if he was without fault contributing to the injury, to act upon the presumption that the defendants had done their duty and provided a safe and secure drive-way."

The chief point of assault is the first sentence of this instruction. This is singled out and its fault asserted to be unan-

swerably proved. But an instruction is not to be disposed of by dissection; if good as a whole it will stand. Few rules are better settled than that an instruction is to be taken as an entirety. *White v. Beem*, 80 Ind. 239; *Branstetter v. Dorrough*, 81 Ind. 527; *Eggleston v. Castle*, 42 Ind. 531; *Mitchell v. Allison*, 29 Ind. 43; *Shaw v. Saum*, 9 Ind. 517.

If, however, the sentence objected to so strenuously stood alone, we could not reverse. A contribution to an injury does not preclude a recovery unless it was a wrongful or negligent contribution. *Shearm. & Redf. Neg.*, sec. 28; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43, 48 (32 Am.R.94). Even a negligent contribution does not necessarily bar a recovery. Unless it proximately contributes, mere negligence does not defeat a plaintiff's action. Wharton says: "Hence we may state as a general principle that, in order to defeat recovery of damages arising from the defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury." *Wharton Neg.*, section 303. Another author states the rule somewhat stronger, saying of the plaintiff in an action like this, that "His negligence must not only concur in the transaction, but must co-operate in causing the injury or in exposing him or his property to it." Again, it is said: "The plaintiff's fault must also proximately contribute to his injury, in order to constitute any ground of defence." *Shearman & Redf. Neg.*, sections 32, 33. Judge Cooley says: "The negligence that will defeat a recovery must be such as proximately contributed to the injury." *Cooley Torts*, 679. In an instruction asked by the appellants and given by the court, the jury were plainly directed that if the appellee was guilty of contributory negligence, there could be no recovery. The definition of contributory negligence stated by appellants in the instruction given at their request is, we may remark in passing, directly opposed to the position now taken by them. In other instructions, the subject is clearly and correctly presented to the jury, and it is quite plain that appellants have no just cause of complaint upon this point.

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Nave *et al.* v. Flack.

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The mere fact that one who has a right to use a way knows that there is a dangerous place in it, will not, of itself, preclude a recovery for injuries received in attempting to use the way in a proper manner. Knowledge is always an important matter for consideration, but it does not always establish contributory negligence. If one undertakes to pass a known danger so great that no person of ordinary prudence would voluntarily encounter it, then he is guilty of contributory negligence, for no one possessing knowledge of danger has a right to go upon a way which ordinarily prudent men would avoid. If, however, the danger is known, but it is not of such a character as that a prudent man would not decline to encounter it, then the attempt to pass it is not, in and of itself, such negligence as will defeat an action. Where there is a known danger of the character just indicated, one who attempts to pass it must show that he used a degree of care proportioned to the danger which he knew was before him. If he fails to show a degree of care commensurate with the magnitude of the danger, he can not recover for injuries received in attempting to pass it. These propositions are fully sustained by our later cases, and elsewhere the adjudged cases sustain them with scarcely a breath of dissent. *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *City of Huntington v. Breen*, 77 Ind. 29; *Murphy v. City of Indianapolis*, 83 Ind. 76.

Applying the law as declared in the cases cited to the evidence in this case, it clearly appears that the verdict is well supported by the evidence, and is not in any respect contrary to law.

Judgment affirmed.

#### ON PETITION FOR A REHEARING.

ELLIOTT, J.—On the original hearing four briefs were presented by as many different counsel for appellants; three were lengthy, and one was addressed to a single point. In our former opinion, we considered and decided all the questions which

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counsel seemed to us to regard as important and which really were so, but it is now said that we did not decide two questions presented, and should grant a rehearing. Without stopping to enquire whether the questions were so discussed in the original briefs as to require consideration from us, under the rules of practice declared in *Millikan v. State, ex rel.*, 70 Ind. 283, *Richardson v. State, ex rel.*, 55 Ind. 381, and like cases, and not stopping to enquire whether they are now properly presented, we give them consideration.

A witness for the appellee testified, over objection, that he had a conversation with Allen, and that Allen said "He did not know how Mr. Marr would feel in regard to a compromise;" that "Allen spoke kindly of Flack, and said that if he had been there this thing would not have happened, because he would have known that he could not drive in there with that kind of a load." The objections urged are thus stated in the only brief which touches this point. "It was immaterial and was calculated to mislead the jury; it did not tend to support any part of the appellee's case." It is plain that the testimony proved, or tended to prove, an admission that the drive-way was not a proper one, and this tended to support appellee's case. It is sufficient to entitle relevant evidence to admission, if it tends to support the issue upon which it is offered. 1 Whart. Ev., section 20. In *Harbor v. Morgan*, 4 Ind. 158, it was said: "The evidence was pertinent to the issue. If it tended to support the defence—tended to make a single link in that defence, it should have been admitted."

In the brief which adverts to the rulings on the evidence it is said: "The court erred in admitting the testimony of John Points and Martin Clauson in rebutting evidence. If it was proper evidence it was evidence in chief." It is an elementary rule, so familiar that we suppose all conversant with the rules of practice know of its existence and application, that the trial court may, in its discretion, permit evidence to be given in reply which would have been proper in chief.

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Nave *et al.* v. Flack.

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*Merrick v. State*, 63 Ind. 327; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Case v. Grim*, 77 Ind. 565; *State v. Hudson*, 50 Iowa, 157.

The evidence was in itself competent. Where it becomes necessary to show knowledge, and that was proper here, it is competent for the purpose of showing knowledge to give evidence of injuries received at the same place by others. The authorities upon this point were fully cited in *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98), and that case has been cited and its doctrine fully approved by the Supreme Court of the United States in the recent case of *District of Columbia v. Armes*, 107 U. S. 519.

No pages of the transcript are referred to in counsel's brief, and we have for the second time examined the record to ascertain if any specific objection to this evidence were stated to the court below, and we find none. The only statement we find in the bill of exceptions is, that the "defendants objected to the evidence," and this is not sufficient to present any question here. Specific objections must be stated to the trial court and incorporated in the bill of exceptions. We have, however, now examined and decided the questions because, as the record is somewhat confused, we feared we might have overlooked the portion of the record disclosing the alleged objections, if any such record there is, and in doing this have done more than counsel's brief required us to do, for it should have referred us to the portions of the record relied on, and this it wholly failed to do.

It may not be amiss to say that we do not believe we are called upon in every case to prolong our opinions by discussing questions not properly saved, nor by incorporating into them information that a search of the record would impart to counsel. It may be proper in some cases, but it is not required in all.

Petition overruled.

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Craig et al. v. Craig et al.

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No. 9624.

## CRAIG ET AL. v. CRAIG ET AL.

HUSBAND AND WIFE.—*Real Estate.—Contract.—Jointure.—Antenuptial Agreement.—Rescission by Parol After Marriage.*—An antenuptial agreement in writing, duly acknowledged, whereby fair provision is made for the wife in case of widowhood, in consideration of which she agrees to forego all interest in his estate which would otherwise accrue by virtue of the marriage, such provision embracing, amongst other things, an estate for her own life in a tract of land described, to take effect upon his death, creates a jointure within the meaning of section 2500, R. S. 1881, and vested in her an estate in lands which can not be divested by parol, and a mutual agreement of the parties, by parol, after marriage, that the contract should not be enforced, can not annul it. R. S. 1881, section 2919.

From the Hancock Circuit Court.

*R. E. Smith* and *J. Hanna*, for appellants.

*D. Moss, R. R. Stephenson, J. S. Duncan, C. W. Smith* and *J. R. Wilson*, for appellees.

HAMMOND, J.—Action by the appellees, as the widow and daughter of Moses Craig, deceased, against the appellants, as the children and grandchildren of said decedent, by a former marriage, to obtain partition of real estate. The petition makes the proper averments as to the decedent being seized at the time of his death of the real estate in controversy, of his dying intestate and leaving the appellees and appellants as his only heirs. The widow claimed to own one-third of all the land in dispute. The appellants answered in two paragraphs, the first being the general denial. The appellees severally demurred to the second paragraph of the answer. The widow's demurrer was overruled, and she replied in four special paragraphs, to each of which the appellants demurred, but their demurrer was overruled and they excepted. The case was tried by a jury, resulting in a verdict in accordance with the allegations and prayer of the appellees' petition. An interlocutory decree was entered, directing partition; commissioners were appointed, who made and reported partition, and their report was confirmed by the court.

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*Craig et al. v. Craig et al.*

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The appellants have assigned as error the overruling of their demurrer to the second and third paragraphs of the widow's reply to the second paragraph of their answer.

The second paragraph of the answer is as follows:

"And for a second and further answer to the plaintiffs' complaint, defendants say and admit that the plaintiff Julia A. Craig is the widow of Moses Craig, late of Marion county, and that the said Moses Craig was the father of defendants, except Nancy Clark and Moses Hamilton, who are the grandchildren of said Moses Craig, and that their father, Moses Craig, died seized of the property, both real and personal, acquired by him during the lifetime of their mother and before his marriage with the plaintiff Julia A. Craig, who was the widow of William Thomas, she, the plaintiff, having children by her former husband and property, which she had acquired by and during the lifetime of the said Thomas, and in view of the said marriage of Moses Craig with the plaintiff, they made the antenuptial contract which is herein set forth in the words and figures following, to wit:

"This agreement made and entered into by Moses Craig, of Marion county, in the State of Indiana, of the first part, and Julia Thomas, of the same county and State, of the second part, witnesseth: That said Moses Craig and Julia Thomas being both of lawful age and unmarried, and being about to be joined in marriage, do contract, that is to say, during the continuance of such marriage, said Moses Craig hereby agrees, binds and obligates himself to furnish and provide for said Julia a suitable and comfortable home with him with all necessary and proper provisions, clothing, etc., suitable to her condition as his wife, and in case she should survive him (such marriage existing and (being) in full force at his death), then, and in that case, said Moses hereby agrees that the following described tract of land'" (here follows description of 80 acres of land) "'shall be set apart for the use and benefit of said Julia, who shall be entitled to the use and occupancy thereof, and to the rents, issues and profits thereof from the time of

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*Craig et al. v. Craig et al.*

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the death of said Moses for and during her natural life, unless she shall again marry, in which case the right to the use and occupancy of such tract of land, with the rents, issues and profits thereof shall terminate at the date of such marriage. It is also agreed by said Moses, as a further means of support to said Julia, should she survive him as aforesaid, there shall be set apart (should there be sufficient funds remaining of the personal estate of him, said Moses, after paying his just debts, with the costs and expenses of administering his estate by his executor or administrator) the sum of \$1,000 in money, which shall be loaned out and kept at an annual interest, to be secured by proper notes and mortgage upon real estate, during the natural life of the said Julia, should she remain unmarried, or, in case of marriage, up to the date of such marriage, the annual interest accruing thereon, to be paid over to said Julia for her support and maintenance. Said Julia is to have no more or greater share of, or interest in, the estate of said Moses than as herein above provided. The real estate above set apart and the principal of said \$1,000 shall revert to and be equally divided amongst said Moses's heirs. Said Moses further agrees that in the event of the death of said Julia before him, he is to have no portion of her estate, but that the same shall go to her heirs. Said Julia being the mother of three children by her former husband, William Thomas, deceased, two daughters aged, respectively, 16 and 13 years, and one son aged 11 years, it is hereby agreed that said Moses Craig is under no obligation to furnish a home or means of support or education for either of said children; that at as early a date as practicable said Julia shall put her said son to some suitable person to learn a trade or the art and business of farming, whereby he may be able to make a suitable support for himself. To all the foregoing the parties hereby agree, and in witness thereof, have hereunto set their hands and seals this — day of July, A. D. 1876.

(Signed)      “‘MOSES CRAIG. [SEAL.]  
                  “‘JULIA THOMAS. [SEAL.]’”

(Here follows certificate of acknowledgment before a justice of the peace.)

"Which contract and agreement was kept and in all things faithfully carried out and fulfilled by said Moses Craig during his lifetime, and up to the date of his death the same was in full force and effect; and that the plaintiff Julia A. Craig in good faith kept and fulfilled and carried out the same up to the death of said Moses, and after his death she caused the same to be recorded in miscellaneous record No. 4, on pages 119, 120 and 121, in the recorder's office of Marion county, Indiana; that said contract is and was of great benefit to said Julia, and the same made generous and ample provision for her support and maintenance during her natural life. Wherefore defendants allege that she, plaintiff, is precluded and estopped from demanding partition as in her petition alleged and demanded. Wherefore," etc.

The second and third paragraphs of said Julia A. Craig's reply to the above answer were as follows:

"2d. That during the lifetime of said Moses Craig the contract mentioned (in the second paragraph of the answer) was rescinded by the mutual consent of the parties thereto, and at the same time it was further mutually agreed by and between said parties that said contract should be cancelled and destroyed; that, by mistake and inadvertence, said petitioner and said Moses Craig neglected to cancel or destroy said contract during the lifetime of said Moses; that shortly after his death the administrator of his estate falsely and fraudulently represented to her, that as she was a second wife of said Moses, she was not entitled to receive any portion of his estate unless she caused said contract to be recorded, and thus acquired it by virtue of said contract; that relying on said representations, and at the time believing them to be true, and being utterly ignorant of her rights as such widow, and having no opportunity to take legal advice in the premises, she was thereby induced to have said contract recorded.

"3d. That after the execution of the contract mentioned in

said second paragraph of said answer, and during the lifetime of said Moses Craig, she, said petitioner, promised and agreed to and with the said Moses Craig, in the event she survived him, not to enforce the provisions contained in said contract for her benefit against his heirs, executors, administrators and assigns, in consideration whereof the said Moses Craig then promised and agreed to and with her, said petitioner, in the event he survived her, not to enforce the provisions therein contained for his benefit against her heirs, executors, administrators and assigns, and in consideration of which said promises and agreements, the said contract by the mutual consent of the parties thereto was rescinded and forever abandoned, and she, said petitioner, further says that, after the death of said Moses, and after the appointment of the administrator of his estate, at the special instance and request of said administrator, and without any consideration whatever being paid or promised her therefor, she caused said contract to be recorded in the recorder's office of said Marion county, but she expressly denies that she has in any way ratified or confirmed the said contract, or accepted the provisions therein made in her behalf since the death of said Moses Craig."

The contract of revocation set out in the second and third paragraphs of the reply, not being averred to have been in writing, is presumed to have been by parol. Overlooking other objections that might be urged against each of the above paragraphs of reply, we will consider a question involved in both, namely, whether the antenuptial contract set forth in the second paragraph of the answer could be annulled by a parol agreement made between the parties during the existence of the marriage relation. We have not been referred to, nor have we been able to find, any authority directly in point upon this question. Contracts between husband and wife were generally void at common law, but in some cases were upheld in equity. Story Equity, section 1372.

Section 36 of our statute of descents, being section 2500, R. S. 1881, is as follows:

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“Whenever an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such intended wife, for the purpose of creating a jointure for such intended wife; or whenever, for the same purpose, a pecuniary provision shall be made for the benefit of the intended wife,—the same shall be a bar to the right or claim of such wife in lands of her husband: *Provided*, The intended wife, at the time of the creation of such jointure, signified, in writing endorsed upon or attached to the deed creating said jointure, her assent to receive the same in lieu of all right or claim of such wife in the lands of the husband.”

The contract set forth in the second paragraph of the answer was a deed creating a jointure within the meaning of the above statute. There was a stipulation in the deed to the effect that the appellee Julia A. Craig was to receive the provision therein made for her in lieu of all right or claim to the other lands of her intended husband. She signed the contract with her intended husband, which was a compliance with the statute requiring her written assent. The subsequent marriage made the contract valid and binding upon both parties. It excluded and barred her marital rights in his property. The marriage conferred upon her such rights only in her husband's property as the contract provided for. But the rights thus acquired amounted to an interest in real estate of which she could not be divested by a parol contract unconnected with circumstances making such contract enforceable in equity. It does not appear from the appellee's reply that in consequence of the mutual agreement between her and her husband, attempting to revoke the antenuptial contract, she parted with or acquired any right whereby, if such parol contract of revocation is disregarded, she can not be placed *in statu quo*. From all that is disclosed in her reply, the marriage settlement can be adhered to, and she will be placed in no worse condition than she would have been, had the oral agreement of cancellation never been made.

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We are of opinion that the contract set up by the appellants in the second paragraph of their answer was under the statute, section 2500, *supra*, a conveyance; that by such conveyance, on the marriage, the parties acquired or retained such interest in real estate as could not be disposed of or exchanged by a parol contract, such as is set forth in the appellee's reply, and that this interest in real estate could not legally be disposed of or exchanged except by deed of conveyance. Section 2919, R. S. 1881, provides that "Conveyances of lands, or of any interest therein, shall be, by deed in writing, \* \* \* \* except *bona fide* leases for a term not exceeding three years." This section applies to an interest in real estate acquired by an antenuptial contract. The parol agreement, relied upon as cancelling that contract, is like that between a grantor and a grantee, after the delivery of the deed, to regard it as rescinded without destroying the deed. The agreement in such case, being void, would not have the effect to re-convey the land to the grantor, and the voluntary destruction of the deed would not have that result, except indirectly, where the deed was not on record, by destroying the grantee's evidence of title, for in such case, after consenting to the destruction of the deed, the rules of evidence would not admit proof of its contents by parol.

We think that the rights of the widow in the real estate of her deceased husband were concluded by the antenuptial contract. The court below erred in overruling the demurrer to the special paragraphs of the reply. Other errors are assigned, but these will not likely occur again, and need not be considered by us.

Judgment reversed, at the costs of the appellee Julia A. Craig, with instructions to the court below to sustain the appellants' demurrer to the special paragraphs of the reply, and for further proceedings in accordance with this opinion.

ON PETITION FOR A REHEARING.

HAMMOND, J.—Counsel for appellee Julia A. Craig ear-

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*Carver et al. v. Smith et ux.*


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nestly insist that the appellants' answer is not in the record, and that no question can, therefore, be made in this court as to the sufficiency of her reply to such answer. This same objection was made by appellee's counsel in their first brief; but after that brief was filed, and before the rendition of the principal opinion, the following agreement was filed in this court:

"State of Indiana, in the Supreme Court. *Craig et al. vs. Craig et al.* Appeal from the Hancock Circuit Court.

"It is hereby agreed that the answer, or paragraphs thereof, attached to the transcript in the above cause by the appellants, is a correct copy of the original, and shall be considered as part of the transcript.

(Signed) "MOSS & STEPHENSON,  
 "Attorneys for appellees.  
 "ROBERT E. SMITH,  
 "Attorney for appellant."

The answer referred to in the above agreement was, and still is, attached to the transcript. Defects in a transcript may be cured or waived by agreement of parties. Under the foregoing agreement, we were authorized to regard, and did regard, the answer as part of the record the same as if it had been properly copied by the clerk in the transcript at the place designated for it. We presume that the filing of the above agreement has escaped the memory of appellee's counsel, for they would certainly not, having it in their mind, ask this court to disregard the appellants' answer.

The petition for a rehearing is overruled,

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No. 10,876.

CARVER ET AL. v. SMITH ET UX.

STATUTE.—*Repeal by Implication.*—Repeal by implication occurs only where there is an irreconcilable repugnancy between two statutes, in which case the earlier in point of time is repealed by the later so far only as is necessary to bring the two into harmony.

90	222
135	188
180	602
90	222
142	224
90	222
148	31
90	222
154	85
154	86
90	222
161	469

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HUSBAND AND WIFE.—*Estates by Entireties.*—*Conveyance.*—*Repeal of Statute.*

—Tenancy by entirety was not abolished, nor the statute recognizing it, R. S. 1881, section 2923, repealed by the act of 1881, enlarging the rights of married women. R. S. 1881, section 5115, *et seq.*

SAME.—*Execution.*—Lands conveyed to husband and wife are not subject to the levy of an execution against either while both are living.

From the Montgomery Circuit Court.

G. D. Hurley, B. Crane and A. B. Anderson, for appellants.

B. T. Ristine, T. H. Ristine and H. H. Ristine, for appellees.

BICKNELL, C. C.—The question presented by the demurrer to the complaint is, what is the title of husband and wife to land conveyed to them jointly?

The appellees held such land under a deed dated January 5th, 1882. The appellants levied thereon an execution against the husband. The complaint of the appellees sought to enjoin the appellants. They separately demurred to the complaint for want of facts sufficient, and their demurrers were overruled. They appeal, assigning as errors the overruling of their demurrers.

The appellants concede that, in Indiana, prior to 1881, a husband and wife, upon a deed made to both, became neither joint tenants nor tenants in common, but were seized of the entirety, so that, on the death of either, the survivor took the whole, and during their joint lives neither could convey without the consent of the other, nor could any part of the land be taken in execution for the separate debt of either; but the appellants claim that, as a necessary consequence of the legislation of 1881 upon the rights of married women, a husband and wife became separate persons, and that, as their legal unity was the basis of the law under which they took the entirety, therefore, as such legal unity no longer exists, the law founded thereon no longer exists, because when the reason of a law ceases the law itself ceases. Co. Litt. 70 b; 7 Co. Rep. 69.

The appellants' proposition is as follows: Under the former law of Indiana a husband and wife took by entireties, because

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*Carver et al. v. Smith et ux.*

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they were legally one person, but, under the statutes of 1881, they are not legally one person, therefore they can no longer take by entireties. The rule that husband and wife take by entireties was a part of the common law, but it has been in force by statute, in Indiana, ever since 1807. Section 236, R. S. 1881, which adopts part of the common law, including the rule aforesaid, was, in substance, first enacted in Indiana in 1807, and has been repeated in each succeeding revision of our statutes. The effect is the same as if for 74 years the statute had expressly declared that husband and wife, under a deed to them jointly, shall take by entireties and not as joint tenants or tenants in common. It is the same in effect as if such a statute had been re-enacted in 1881.

But this is not all. The existence of this statutory rule has been recognized by other legislation. Section 18, R. S. 1843, p. 417, provides that conveyances of land to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, and section 19, next following, provides that the preceding section shall not apply to conveyances made to husband and wife, and these provisions of the law of 1843 are repeated in the Revised Statutes of 1852, vol. 1, p. 233, sections 7 and 8, and in the Revised Statutes of 1881, sections 2922, 2923; and the existence of the said statutory rule has been judicially recognized. This court has always held that upon a deed to husband and wife they take by entireties, and that during their joint lives there can be no sale of any part on an execution against either. *Bevins v. Cline*, in 1863, 21 Ind. 37, 41; *Davis v. Clark*, 1866, 26 Ind. 424, 428; *Arnold v. Arnold*, 1868, 30 Ind. 305; *Simpson v. Pearson*, 1869, 31 Ind. 1, 4; *Chandler v. Cheney*, 1871, 37 Ind. 391; *Jones v. Chandler*, 1872, 40 Ind. 588; *Anderson v. Tannehill*, 1873, 42 Ind. 141; *McConnell v. Martin*, 1876, 52 Ind. 434; *Hulett v. Inlow*, 1877, 57 Ind. 412 (26 Am. R. 64); *Lash v. Lash*, 1877, 58 Ind. 526; *Patton v. Rankin*, 1879, 68 Ind. 245 (34

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Carver *et al.* v. Smith *et ux.*

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Am. R. 254); *Edwards v. Beall*, 1881, 75 Ind. 401. Here is an unbroken line of decisions from 1863 to 1881, all of them recognizing the validity of the statutory law as to entireties, and none of them intimating that said law had been in any degree impaired by the legislation of 1852 and later years enlarging woman's rights.

By chapter 52 of the R. S. of 1852, vol. 1, p. 320, the common-law rights of a married woman as to her separate real estate were substantially enlarged; they were again extended repeatedly. See Acts 1857, p. 92; Acts 1861, p. 182; Acts 1865, Spec. Sess., p. 184; Acts 1875, p. 178; Acts 1877, p. 94; Acts 1879, p. 160, and R. S. 1881, sec. 5115.

Sections 5 and 6, 1 R. S. 1852, p. 321, declared that the lands of a married woman should be her separate property as fully as if she were unmarried, provided that she should have no power to encumber or convey such lands except by deed, in which her husband should join, and that the separate deed of the husband should convey no interest in his wife's lands; but, although these statutes recognized the separate existence of the wife as a person, with interests distinct from those of her husband, and to that extent destroyed the old legal unity of the parties, yet it was never claimed that they, by implication, repealed the statute as to entireties, and all the cases above cited were decided while the statutes aforesaid of 1852 were in force.

The act of 1881, R. S. 1881, section 5117, is as follows:

"A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. \* \* But she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage

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Carver *et al.* v. Smith *et ux.*

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the same, unless her husband join in such contract, conveyance, or mortgage: *Provided*, however, That she shall be bound by an estoppel *in pais*, like any other person."

The wife's right to her separate real estate, as a distinct person, is just as fully established by the aforesaid legislation of 1852 as by the legislation of 1881, and it is coupled with the same limitation in both the statutes, to wit, that she shall not convey or encumber the property except by deed, in which her husband shall join. The appellants recite the provisions of said acts of 1881 and ask "how can these provisions be reconciled with the idea of unity?"

Conceding that they can not be, and admitting that the old common law upon entireties was founded originally upon the legal unity of husband and wife, yet it does not follow that the statute of Indiana was enacted in 1807 and re-enacted in 1843 and in 1852 for any such technical reason. It was probably re-enacted in 1852 for sound reasons of public policy. See *Chandler v. Cheney, supra*, p. 410. And it certainly does not follow that a long established rule of property, declared by the Legislature, is abrogated by the mere fact that the reason alleged for the common law rule existing before the statute has failed.

Where there are several statutes co-existing, and the last of them is repugnant to the others, it impliedly repeals the others; that is, where they can not all stand and be enforced. *Farmers, etc., Ins. Co. v. Harrah*, 47 Ind. 236; *State, ex rel., v. Forkner*, 70 Ind. 241. But repeals by implication are not favored in law. *Cruse v. Axtell*, 50 Ind. 49; *Lichtenstein v. State*, 5 Ind. 162.

There is no such repugnancy between the statutes now under consideration.

A married woman may well have all the personal rights conferred by the act of 1881, as to her separate property, without any interference or collision with the statutes as to entireties.

When husband and wife take by entireties, neither of them holds any of the property separately; in that respect they are equal, although in some respects he has personal rights of property which she has lost by her marriage.

Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. *Chandler v. Cheney, supra*, p. 414. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. Ram Judg. 237.

It is evident that the Legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the separate power of the wife, which already existed under the acts of 1852 and the years following. In *Chandler v. Cheney, supra*, this court, after citing the many changes as to woman's rights introduced by the Legislature of 1852, says: "But it did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as tenants in common or as joint tenants. The Legislature evidently had some purpose in continuing this peculiar estate. What was the purpose? In ascertaining the legislative intention we are required to take into consideration the entire scope of legislation during that session. There was a strong and determined purpose manifested to guard and protect the rights of married women. It is quite obvious to us, that the evident and manifest intention of the Legislature in providing for the continuance of estates by entireties, as between husband and wife, when joint tenancies between persons who were not married had been virtually abolished, was to provide a mode in which a safe and suitable provision could be made for married women." Again, after mentioning some of the difficulties connected with deeds of trust in

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*Carver et al. v. Smith et ux.*

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favor of married women and with deeds made directly to the wife, the court says: "To remedy this condition of things the Legislature continued this estate. It is true that it had existed at common law, but was not very clearly defined or understood, \* \* and as the virtual abolition of this tenancy would have destroyed estates by entireties, unless expressly saved by the statute, it was so saved and perpetuated. \* \* \* An estate by entireties is better calculated to produce an unity of feeling and interest than any other."

As we have seen, the same provisions as to entireties which were thus "saved and perpetuated" in the revision of 1852, and were not impliedly repealed by the legislation of 1852 upon woman's rights, were again repeated in the revision of 1881. They were not repealed by the legislation of 1881 enlarging woman's rights to her separate property, and are not repugnant thereto. Cases are referred to by the appellants by which in New York, New Hampshire, Illinois and Iowa, it has been held that the recent legislation of those States upon woman's rights has, in effect, abolished estates by entireties. The statutes of those States are not the same as ours, but, if they were, we could not, under our legislative and judicial history above referred to, follow those decisions. We think the statutes of this State authorizing estates by entireties have not yet been repealed, either expressly or by implication. On the contrary, the continued existence of such statutes is as fully recognized by the legislation of 1881 as it was by the legislation of 1852. There was, therefore, no error in overruling the demurrer to the complaint.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

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 Smith, Administrator, v. Ferguson.
 

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No. 7313.

## SMITH, ADMINISTRATOR, v. FERGUSON.

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126	98
90	239
126	238

**DECEDENTS' ESTATES.—Personal Property.—Chose in Action.—Title of Administrator.—Replevin.**—When the administrator of a decedent is appointed and qualified, the title and possessory rights of the decedent, in and to his personal property and choses in action, at once pass to and vest in his administrator, and he can maintain an action of replevin therefor.

**SAME.—Gift Inter Vivos.—Delivery in Præsentia.**—To constitute a valid gift *inter vivos* of personal property or choses in action, it is essential that the gift be delivered *in præsentia* and unconditionally; because, if the gift be delivered to a third person, for future delivery to the donee, the authority to deliver may be revoked, and, until delivery, the donor retains dominion.

**SAME.—Gift Causa Mortis.—Implied Condition.**—A gift *causa mortis* is a gift of a chattel or chose in action, made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void; and it is necessary to the validity of such a gift that there must be an actual delivery of the subject of the gift to the donee, such as will transfer its possession to him.

From the Tippecanoe Circuit Court.

*J. M. LaRue, F. B. Everett, W. C. Wilson and J. H. Adams,*  
for appellant.

*B. W. Langdon,* for appellee.

**HOWK, J.**—In his complaint in this action, the appellant, the plaintiff below, alleged in substance, that, as the administrator of the estate of Mahala T. Shaw, deceased, he was the owner and entitled to the possession of eight promissory notes, each particularly described, and all of the value of \$2,500; and that the appellee had possession of said notes without right, and unlawfully detained the same from the appellant, at Tippecanoe county; wherefore, etc. The cause was put at issue and tried by the court, and a finding was made for the appellee, the defendant below; and over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on its finding.

In this court the appellant has assigned as errors the following decisions of the trial court:

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1. In overruling his demurrer to the third paragraph of appellee's answer ; and,

2. In overruling his motion for a new trial.

In the third paragraph of his answer, the appellee alleged in substance, that Mahala T. Shaw, the appellant's decedent, on and before the — day of July, 1875, was the owner and holder of eight promissory notes, particularly describing them ; that on said last named day the said Mahala T. Shaw delivered and entrusted all of said notes into the hands and possession of the appellee ; that contemporaneously with her delivery of said notes to him, the said Mahala declared to and directed the appellee to take the said notes and do the best he could with them, and furnish her, the said Mahala, with what means she needed to live on, and, after her death, pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother, Solomon, and what was left was Clarinda V. Ferguson's, who was then and since the wife of the appellee, and that the appellee should give what was left to her, the said Clarinda.

The appellee said that he then and there received and took possession of said notes from said Mahala, under the said declaration and terms ; that afterwards, in March, 1876, the the appellee exchanged one of the notes for five other notes particularly described ; and that, in January, 1877, appellee surrendered Carr's note for \$90 to said Carr on account of a debt due him from said Mahala.

The appellee further said that the notes described in the complaint were the notes described in his answer ; that afterwards, on the 7th day of October, 1877, the appellee was holding, and in the possession of, the notes described in the complaint, and the said Mahala T. Shaw being then dangerously sick and ailing, and in the apprehension of her death, said to and charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him as aforesaid, on the — day of July, 1875, as thereinbefore alleged, and the appellee then and there promised

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the said Mahala that he would do so ; that afterwards, on the 8th day of October, 1877, the said Mahala died of said sickness. The appellee charged, that, by reason of the premises, he was entitled to said notes to deal with them as best he could, to pay the decedent's lawful debts, and after building the monument, as thereinbefore described, to give and deliver what might be left of such notes, or their proceeds, to the said Clarinda. The appellee said that the note first described in the complaint, he did not have or hold at the commencement of this action, nor at any time since ; and that the estate of said Mahala T. Shaw, deceased, was solvent. Wherefore the appellee said that the appellant was not entitled to said notes, and he prayed judgment for his costs herein. /

We are of opinion that the facts stated in this paragraph of answer are not sufficient to constitute a cause of defence to the appellant's action. It is admitted in the paragraph that the notes in controversy were, on the — day of July, 1875, the notes of Mahala T. Shaw, at the time she delivered and entrusted them to the appellee ; and it is not shown by any averment therein, that she ever parted with her title to any of the notes during her natural life. She made him her agent, with directions to do the best he could for her with the notes, and to furnish her with what means she needed to live on during her life. Her declaration and direction to the appellee, which must be assumed to have been verbal or oral, because they were not alleged to have been in writing, went further and provided that after her death he was to pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother Solomon, and what was left was Clarinda V. Ferguson's, the wife of the appellee, and that he should give what was left to his wife, the said Clarinda. This is the substance of what transpired between the appellee and Mahala T. Shaw, her declaration and direction, in relation to the notes in controversy, on the — day of July, 1875. It is not shown thereby, as it seems to us, that on that day there was any gift, by or on the part of Mahala T. Shaw,

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during her life, of the notes or any part thereof to the appellee, or his wife, or to any one else. There was no gift *inter vivos* of any of the notes or of any part of the proceeds thereof. The declaration and directions of Mahala T. Shaw to the appellee in July, 1875, as stated in the answer, did not constitute or show a gift *in præsenti*, or during her life, of the notes in controversy; but they were testamentary in their terms, and, without the form or solemnity of a will, attempted to make a gift of whatever might be left, after certain things had been done, to take effect as a gift only after her death.

In *Smith v. Dorsey*, 38 Ind. 451 (10 Am. R. 118), this court said: "To constitute a valid gift *inter vivos* it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete." In *Sessions v. Moseley*, 4 Cush. 87, the Supreme Court of Massachusetts held that a gift *inter vivos* must be delivered in the lifetime of the donor, because, if delivered to a third person, with instructions to deliver to the donee, the authority to deliver may be revoked, and until delivery the donor retains dominion. 1 Pars. Con. 234; 2 Kent Com. 438; Bouv. Law Dict., Tit. Gifts *inter vivos*; *Bedell v. Carll*, 33 N. Y. 581; *Irish v. Nutting*, 47 Barb. 370; *Dexheimer v. Gautier*, 34 How. Pr. 472.

It follows from what we have said, that the averment of appellee's answer in reference to what was said and done by and between him and Mahala T. Shaw on the — day of July, 1875, of and concerning the notes in controversy, utterly fail to show a valid gift *inter vivos* of the notes, or of any of them, or of any part of the proceeds thereof, to the appellee's wife or to any other person. They fail to show that she parted or intended to part during her life with her title to or

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ownership of any of such notes. If the title to the notes remained in her, if she continued to be the owner thereof, and if she might have asserted and maintained against the appellee or the appellee's wife, her right to the possession thereof during her natural life, it must be that upon her death her title to and ownership of the notes, and her right to the possession thereof, passed to and vested in the appellant, as the administrator of her estate. We have hitherto considered only the averments of the answer in regard to what transpired between the appellee and Mahala T. Shaw, concerning the notes in controversy in July, 1875. At that time, it must be assumed, as nothing was alleged to the contrary, Mahala T. Shaw was in good health, and we have reached the conclusion that the allegations of the answer did not show that she then made a valid gift *inter vivos* of the notes to appellee's wife or to any one else.

The question remaining for consideration is this: Do the averments of the answer show a valid gift *causa mortis* of the notes in controversy? A gift *causa mortis* is thus defined: A *donatio causa mortis* is a gift of a chattel made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void. 2 Schoul. Pers. Prop., p. 122, note 1. In 3 Redf. Wills, 326, it is said, *inter alia*, that there must be an actual delivery of the chattel to the donee, so as to transfer the possession to him, in order to constitute a good gift *mortis causa*. In the third paragraph of appellee's answer in the case in hand, it was not alleged that on October 7th, 1876, there was any actual delivery of the notes to the donee, or any transfer of the possession thereof. In the close of his answer, the appellee alleged that on the 7th day of October, 1877, the said Mahala T. Shaw being then dangerously sick, and in the apprehension of her death, charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him in July, 1875, which notes he was still

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holding and in the possession of, and the appellee then and there promised the said Mahala that he would do so. We do not think that these allegations were sufficient to show a gift then made, *causa mortis*, of what was left of the notes or of the proceeds thereof. They show rather, as it seems to us, an unwritten will, whereby she attempted to dispose of whatever might be left after her death of the notes or the proceeds thereof.

The charge of Mahala T. Shaw to the appellee on October 7th, 1877, in her last illness and in apprehension of her death, did not constitute a gift, either *inter vivos* or *causa mortis*, of the notes or of what might be left of the proceeds thereof, to the appellee's wife. It was simply an injunction or direction that, after her death, the appellee, as her agent and the custodian of her notes, should carry out her wishes in relation thereto and dispose of the same, as she had directed in July, 1875; that is, he should pay whatever debts he knew she owed and erect a monument for her like the one ordered for her brother Solomon, and then he should give whatever might be left of the notes, or of their proceeds, to his wife, Clarinda V. Ferguson. In 2 Schouler on Personal Property, p. 82, it is said: "An agency is revoked by the principal's death: therefore, the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime; otherwise the gift fails, as though the donor himself had failed to make a reasonable delivery. Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease; for a gift of personalty made after this fashion must stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will." *Sessions v. Moseley*, *supra*; *Allen v. Polereczky*, 31 Maine, 338; *Phipps v. Hope*, 16 Ohio St. 586.

Construing together all the allegations of the third paragraph of appellee's answer, we are of opinion they wholly

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fail to show that Mahala T. Shaw parted, or intended to part, during her lifetime, by gift *inter vivos* or *causa mortis*, with her title to or right to the possession of the notes in controversy or the proceeds thereof. Notwithstanding all that was said or done by or between her and the appellee, of and concerning such notes or their proceeds, they remained her property and estate, we think, until and at the moment of her death, and as such the title thereto and the right to the possession thereof passed to the appellant as the administrator of her estate, to be administered according to law. The alleged solvency of her estate furnishes no reason whatever for the appellee's detention of the notes as against her administrator. It seems to us, therefore, that the court erred in overruling the demurrer to the third paragraph of the appellee's answer.

This conclusion renders it unnecessary for us to consider or decide any of the questions arising under the alleged error of the court in overruling the appellant's motion for a new trial. We may properly remark, however, that the evidence in the record does not, in our opinion, sustain the averments and theory of the third paragraph of appellee's answer. The appellant gave in evidence a written receipt, executed by the appellee to Mahala T. Shaw, in substance as follows:

"BATTLE GROUND, IND., March 22d, 1876.

"Received of Mahala T. Shaw the following notes, to be held in trust for her:" (Here follows a description of the notes in controversy in this action.)

(Signed)

"W. R. FERGUSON."

It will be observed that this receipt, from its date, was executed by appellee to Mahala T. Shaw, about eight months after her declaration and direction to him, in July, 1875, upon which the appellee founded the third paragraph of his answer. If, by this receipt, the appellee became the trustee of Mahala T. Shaw, and so held the notes, by the terms of the receipt he held them "in trust for her," as the sole *cestui que trust*, from and after the date thereof, and any prior parol trust, in relation to the notes, was thereby abrogated. It was

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shown by the evidence that this receipt was in the pocket-book of Mahala T. Shaw, which pocket-book was found under her pillow immediately after her death. It may be assumed, therefore, as it seems to us, that the notes were held by the appellee under such receipt, at the time of the death of Mahala T. Shaw, and the consequent determination of the trust thereby created. This being so, the appellant as her administrator was entitled to the notes and the possession thereof, as against the appellee.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the third paragraph of appellee's answer, and for further proceedings not inconsistent with this opinion.

Petition for a rehearing overruled.

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No. 10,607.

THE BOARD OF COMMISSIONERS OF WHITE COUNTY v. KARP.

COUNTY COMMISSIONERS.—*Right of Appeal.*—*Railroad Aid.*—A petition by a taxpayer to the county board, praying that money collected by taxation in his township to aid a railroad by taking stock, be applied accordingly, was refused by the board.

*Held*, that the petitioner had the right of appeal to the circuit court.

BILL OF EXCEPTIONS.—*Transcript.*—*Striking out Pleadings.*—*Supreme Court.*—*Record.*—When the court strikes out a pleading, it ceases to belong to the record, and it can become a part of the record again only by being incorporated in a bill of exceptions, and if this be not done the clerk should not insert it in a transcript for the Supreme Court.

SAME.—A paper which is no part of the record, unless made so by bill of exceptions, must be found in the bill itself, else it will not be regarded by the Supreme Court. A mere reference in the bill to a paper, copied in the record, but which is not a part thereof by force of the statute, is not sufficient.

From the White Circuit Court.

*R. Gregory*, for appellant.

*N. O. Ross*, *A. W. Reynolds* and *E. B. Sellers*, for appellee.

*ZOLLARS, J.*—At the June session, 1882, of the board of

90	236
129	361
90	236
126	537
90	234
145	254
90	236
156	638

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commissioners of White county, appellee, as a resident and taxpayer of Union township of said county, filed a petition with said board, stating therein that of the tax theretofore levied by said board on the taxable property of said township, to enable it to aid the Indianapolis, Delphi and Chicago Railroad Company in the sum of \$24,400, in the construction of its railroad, by taking stock of the company, there had been collected, and was then in the treasury of the county, \$15,800; that the railroad was, and had been, completed for more than three years, and that the passenger and freight trains had been running over the same regularly since its completion. The prayer is that the board subscribe to the capital stock of said Indianapolis, Delphi and Chicago Railroad Company, in the name of the township, the sum of \$15,500, and pay therefor, at the time of taking, out of the money so collected and in the treasury.

After "due deliberation," the board refused to grant the prayer of the petition. From this decision appellee appealed to the circuit court. The proceedings in that court, so far as they need be considered in the decision of the questions discussed by appellant's counsel, are as follows: Appellant filed what is designated in the record a "cross complaint or interpleader," which was stricken out on motion of appellee, and appellant excepted. After the filing of a general denial by appellant, the cause was tried by the court, and a finding made in favor of appellee. A motion for a new trial was overruled, and judgment rendered, requiring the board of commissioners to subscribe, in the name of said Union township, \$15,500 to the capital stock of the railroad company, and to pay for the same out of the funds in the county treasury, levied and collected for that purpose, upon the delivery of the stock of the company in that amount, in the name of the township. From this judgment appellant prosecutes this appeal.

The only points made in argument in this court by its counsel are: *First*. That appellee had no right of appeal from the decision of the board of commissioners; his only remedy be-

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ing by a proceeding in mandamus; and, *Second*. That the court below erred in striking out the so-called cross complaint.

The first question is not really before us. To test that question appellant should have moved in the court below to dismiss the appeal. This it did not do.

A demurrer to the petition was filed in that court. That called in question the sufficiency of the petition, but not the right of appeal. We may notice in passing that no objection was made to the form or substance of the judgment, and in this court there is no argument or suggestion upon the sufficiency or insufficiency of the petition. All questions, therefore, as to the petition and the judgment, and all other questions not discussed by appellant's counsel, are waived. *Merrick v. Leslie*, 62 Ind. 459; *Powers v. Johnson*, 86 Ind. 298; *Jenkins v. Rice*, 84 Ind. 342. We think that, without doubt, appellee was entitled to an appeal from the decision of the board of commissioners. The question was not whether the board should act at all, as was the case when the matter of this appropriation was last before us in the case of *Pfister v. State, ex rel.*, 82 Ind. 382, but whether the action taken and the decision made was the correct one. In making that decision the board acted in a judicial capacity. From all decisions made when thus acting, there is a clear right of appeal. *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Fordyce v. Board, etc.*, 28 Ind. 454; *Smith v. Seearce*, 34 Ind. 285; *State, ex rel. v., Board, etc.*, 45 Ind. 501.

The record as made by the clerk contains statements that appellant filed a cross complaint and an amended cross complaint, which, on motion of appellee, were stricken out. A bill of exceptions contains similar statements, with a statement by the clerk that the cross complaint is set out in another portion of the transcript. On the pages referred to we find what purports to be a "cross complaint or interpleader." When stricken out the cross complaint ceased to be a part of the record until restored to it by a proper bill of exceptions. On appeal to this court, it was the duty of the clerk to set it

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 Moore *et al.* v. Cottingham *et al.*


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out in full as a part of the bill of exceptions, if properly so made. It was not his duty to include it in the transcript, except as a part of the bill, and having done so does not constitute it a part of the record.

Not being a part of the record, we can not look from the bill of exceptions, where it belongs and is called for, to other portions of the transcript, where the clerk had no right to insert it. When a pleading or written instrument is a part of the record by force of the statute, and has been once copied into the transcript, and is referred to in the bill of exceptions, the clerk need not again set it out in full, but may refer to the page and line of the transcript where it may be found. When not thus a part of the record, such reference will not suffice. *Kesler v. Myers*, 41 Ind. 543; *Baker v. Arctic Ditchers*, 54 Ind. 310. In earlier cases we have pointed out the trouble and hazard that would result in a departure from this rule of practice, and need not repeat. It must be apparent to the profession. The cross complaint not being in the record is not before us, and in its absence we can not say that the court below erred in striking it out. We find no error in the record, and the judgment is therefore affirmed, at the costs of appellant.

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 No. 10,516.

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128	49

### MOORE ET AL. v. COTTINGHAM ET AL.

**MARRIED WOMAN.—Trustee.—Conveyance.—Parol Trust.—Evidence.—Wife's Separate Deed.**—Where a husband and his wife convey his real estate to their son, who conveys the same to the wife in pursuance of a parol agreement that the wife will hold such land in trust for the husband, and the wife thereafter, in execution of such trust, by her separate deed, conveys such land to the son who conveys the same to the husband, proof of such facts is admissible for the purpose of showing that the wife held said land in trust for her husband, and her separate deed, in execution of such trust, is sufficient to convey such land.

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Moore *et al.* v. Cottingham *et al.*

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**SAME.—Husband and Wife.**—A parol trust concerning lands can not be enforced, nor is the separate deed of a married woman sufficient to convey lands of which she is the beneficial owner.

**SAME.**—A parol trust may be shown, not for the purpose of enforcing it, but for the purpose of showing that it has been fully executed, and when a married woman holds lands in trust she may execute the same by her separate deed.

From the Hamilton Circuit Court.

*D. Moss, R. R. Stephenson and W. S. Christian*, for appellants.

*W. Garver and F. B. Pfaff*, for appellees.

**BEST, C.**—This action was brought by the appellants against the appellees to obtain an injunction. The court, upon request, found the facts specially, and stated its conclusions of law thereon. The facts found are these:

1st. That in the year 1867, one John Moore, the father of the appellants, was the owner in fee of the land in the complaint described, situated in Hamilton county, Indiana, and was also the owner of \$1,200 worth of personal property; that "being a man of dissipated habits, and extravagant while dissipating," he transferred all his personal property to one of his sons for the purpose of paying his debts, and at the same time he and his wife Louisa conveyed said land to one of his sons, Marion Moore, who thereupon conveyed the same to said Louisa Moore; that each of said conveyances was absolute in form, and was made pursuant to a parol agreement between all of said parties, that the title should be held by said Louisa, wife of said John, in trust for him, in order to preserve the property and to prevent him from squandering it while dissipating, and for no other purpose.

2d. That said conveyances were made in good faith by all the parties, and with no intention to defraud any one.

3d. That after said conveyances were made said John retained possession of, and exercised dominion over, said land as before, and said Louisa lived upon said land with her husband as she had done for many years before, and not otherwise.

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4th. That a few years after said conveyances were made said John became dissatisfied with the arrangement, and, wishing to resume the title, his wife conveyed the land to her said son without said John joining her in such conveyance, and said son thereupon conveyed said land to his father, said John, in execution of said trust.

5th. That, after said last named conveyances, said Louisa Moore departed this life intestate, leaving one John E. Moore and other children and her husband surviving her as her only heirs at law.

6th. That said John afterwards conveyed said land to the appellants, who, by virtue of such conveyance, claim to own the land in fee simple.

7th. That, at the death of Louisa, the appellee Cottingham held a judgment against John E. Moore, rendered in the Hamilton Circuit Court, which became a lien upon such interest in said land as said John E. may have inherited from his mother; that an execution issued upon said judgment had been placed in the hands of said Semans, sheriff of said county, who had levied upon an undivided interest in said land, and threatened to sell the same as the property of said John E. Moore to satisfy said writ, etc.

Upon these facts, the court concluded that the trust attempted to be created was void; that the separate deed of Louisa Moore to her son, her husband not joining therein, was void; that said Louisa died the owner of said land, and that an undivided interest therein was subject to the lien of the appellees' judgment.

The appellants excepted to the conclusions of law, and these are assigned as error.

It may be conceded that an express parol trust concerning lands such as is found in this case can not be enforced, as it is within the express inhibition of our statute. R. S. 1881, section 2969.

It is also conceded that if no trust existed the deed of the

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wife, in which the husband did not join, conveyed no title to the son, as such deed is void. *Scranton v. Stewart*, 52 Ind. 68.

The questions, however, are not whether the trust can be enforced, or whether the separate deed for the land of a married woman is void, but whether such trust can be proved for the purpose of showing that the same has been executed, and whether the separate deed of a married woman in execution of such trust is valid.

The statute of frauds is a bar to the enforcement of a parol contract concerning lands, but the statute does not render such contract illegal, and the parties may perform the contract if they think proper. *Abbott v. Draper*, 4 Denio, 51; *Stone v. Dennison*, 13 Pick. 1.

Whether such trust exists may be shown, not for the purpose of enforcing it, but for the purpose of showing that it has been fully executed. 1 Perry Trusts, section 77; *Eaton v. Eaton*, 35 N. J. L. 290.

Such trust, as before remarked, can not be enforced, but if it has been executed the same will be upheld and sustained, and for this purpose proof of the facts will be allowed though the trust rests in parol.

The facts found show that the wife took the title in trust for the husband, and were this trust such as could have been enforced, this fact would be enough to defeat the appellees, as a trust estate is not liable for the debts of the trustee nor of those who represent him by inheritance. *Hollingsworth v. Trueblood*, 59 Ind. 542.

This trust, however, could not have been enforced, and, therefore, in order to shield the property from the claim of the appellees, it was necessary to show that the trust had been executed. This was attempted by showing that the trustee, a married woman, had, in execution of it, made a deed in which her husband did not join. Was that conveyance sufficient to execute the trust? We think it was. Had she been the beneficial owner of the land the deed made would have been worthless, as a married woman has no power to convey her lands

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unless the husband join in the conveyance. R. S. 1881, section 2921; *Seranton v. Stewart*, *supra*.

This rule, however, does not apply to lands held by her as trustee, but by the express terms of the statute applies to the "lands of the wife," i. e., those of which she is the beneficial owner. As to those held by her as trustee she is under no legal disability, but possesses the same capacity as though she were *sole*. Perry Trusts, section 48, and authorities cited.

This must be the rule, as it is well settled that a married woman may be a trustee even for her husband, and she may be compelled to execute her trusts. If this trust had been declared in writing, it could have been enforced against her, but in such case all that could have been required would have been her conveyance of the property in execution of the trust. This must in the very nature of things be so, especially in view of the fact that the husband was himself the *cestui que trust*. If then the wife could only have been required to convey the land in execution of the trust, it must follow that her conveyance of it voluntarily made, amounts to a complete execution of the same. The husband could not have been required to unite in the deed, and therefore the deed of the wife was sufficient. It, therefore, appears to us that the trust found by the court to exist may be proved to show that the deed made was in execution of such trust, and that it was sufficient for such purpose.

This conclusion is based upon the assumption that the trust created required the wife, when the causes that induced it ceased to exist, to reconvey the property to the husband, and we think it fairly inferable from the facts stated and the conduct of the parties, that the purpose for which it had been conveyed had been fully accomplished. Under these circumstances, it becomes the duty of the wife, as trustee of the husband, to reconvey the property, and this conveyance was a complete execution of the trust. Perry Trusts, section 352.

For these reasons we are of opinion that the title to the property was not in the wife at the time of her death, and that

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the court erred in its conclusions of law upon the facts found. The judgment should, therefore, be reversed.

**PER CURIAM.**—It is therefore ordered, upon the foregoing opinion, that the judgment be reversed in all things, at the appellees' costs, with instructions to state conclusions of law in accordance with the foregoing opinion, and to render judgment thereon in favor of appellants.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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No. 10,206.

**HOLLINGSWORTH v. STONE.**

**MISTAKE.**—*Voluntary Payment.*—*Legal Compulsion.*—*Without Fraud.*—Money voluntarily paid under no mistake of fact, without fraud or imposition upon the party paying it, can not be recovered, although it was not legally due, and it makes no difference that the money was paid under compulsion of legal process. It may still be lawfully retained by the party receiving it, if there was no fraud on his part and no undue advantage taken by him of the situation of the other party.

**SAME.**—*Mistake of Law.*—*Equity.*—A mistake of law is no ground of relief even in equity, yet it may be connected with such circumstances as will entitle a party to relief.

**SAME.**—*Fraud.*—*Void Judgment.*—*Justice of the Peace.*—*Arbitration.*—*Jurisdiction.*—*Recovery of Money Extorted.*—*Pleading.*—In a suit before a justice of the peace, the defendant pleaded a set-off, orally stating that he did not wish for any excess of the set-off over the plaintiff's demand. There was then a reference of the dispute to arbitrators, but no award was made, and the justice afterwards rendered a judgment in favor of the defendant for \$130, and eight months thereafter an execution was issued thereon, which was the first knowledge the plaintiff had of the judgment. At that time the plaintiff was sick, in distress, because of the recent death of several children, and ignorant of her rights, and it was then represented to her by the defendant and the justice that she had no remedy, who threatened to levy upon and sell all her property. She believed them and in consequence paid the judgment.

**Held,** upon these facts, that she could maintain a suit to recover the money paid.

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*Held*, also, that the judgment was void, because the justice had no jurisdiction to render it, and that it was not necessary to a recovery to aver or prove that the plaintiff did not owe the debt for which the judgment was rendered.

From the Hendricks Circuit Court.

*J. V. Hadley, E. G. Hogate and R. B. Blake*, for appellant.  
*L. M. Campbell*, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant and one Johnson to recover back money alleged to have been paid upon compulsion.

The complaint averred that the plaintiff sued the appellant Hollingsworth, before said Johnson, who was a justice of the peace; that in said suit Hollingsworth filed a plea of set-off without asking for any judgment against the plaintiff, and stated before the justice that he claimed no judgment against the plaintiff for any excess of his set-off over the plaintiff's claim; that thereupon the matters in issue in said suit were submitted to certain arbitrators who never made any legal arbitration or award, but said Johnson afterwards, and without plaintiff's knowledge, entered a judgment against the plaintiff for \$130.29 in June, 1881, of which the plaintiff had no knowledge until February, 1882; that about the time last mentioned plaintiff received \$700 pension money, and then said Johnson and Hollingsworth had an execution issued on said judgment and placed it in the hands of a constable, who served the same upon the plaintiff, and threatened to sell her property unless she paid said \$130 and costs; that the defendants represented to her that she would be compelled to pay the execution, and could not appeal or avoid the payment, and that unless she paid the money at once they would levy on everything she had and would put her to great expense and trouble; that the plaintiff was in feeble health, ignorant of business and of her legal rights, in great distress, caused by the recent death of seven of her family, and that believing the representations of said defendants, she paid them \$110 on said judgment, which they still hold. The complaint de-

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manded the recovery of \$110 with interest and costs, or else that the court would permit the plaintiff to appeal from said judgment and would grant all proper relief.

The defendants filed separate demurrers to the complaint for want of facts sufficient. These demurrers were overruled. The defendants answered jointly by a general denial.

The issue was tried by the court, who found for the defendant Johnson, and for the plaintiff against the defendant Hollingsworth, with \$111 damages. Hollingsworth moved for a new trial, alleging that the finding was not sustained by sufficient evidence and was contrary to law. This motion was overruled, judgment was rendered on the finding and Hollingsworth appealed.

The errors assigned are:

1. Overruling the demurrer to the complaint.
2. Overruling the motion for a new trial.
3. That the complaint does not state facts sufficient to constitute a cause of action.

In general, money paid under a mistake of fact may be recovered, *Brown v. College Corner, etc., G. R. Co.*, 56 Ind. 110; but money paid under a mistake of law can not be recovered. *Telle v. Green*, 28 Ind. 184. And money voluntarily paid with full knowledge of all the facts can not be recovered, although there were no misconception about the law. *Denby v. Moore*, 1 B. & Ald. 123; *Harris v. Loyd*, 5 M. & W. 432.

In *Moses v. Macferlan*, 2 Burr. 1005, it was held that money paid on a judgment might be recovered if in equity and good conscience the party receiving it was not entitled to it, but this case has been repeatedly denied to be the law. *Phillips v. Hunter*, 2 H. Bl. 402; *Brisbane v. Dacres*, 5 Taunt. 143; and is regarded as overruled. *O'Hara v. Hall*, 4 Dallas, 340; *Smith v. Lewis*, 3 Johns. 157, 169 (3 Am. Dec. 469); *Regan v. Baldwin*, 126 Mass. 485 (30 Am. R. 689.)

The law is now well settled that money voluntarily paid, under no mistake of fact, and without fraud or imposition upon the party paying it, can not be recovered, although it

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was not legally due, and it makes no difference that the money was paid under compulsion of legal process; it may still be lawfully retained by the party receiving it, if there were no fraud on his part and no undue advantage taken by him of the situation of the other party. *Marriott v. Hampton*, 7 T. R. 265; *Hamlet v. Richardson*, 9 Bing. 644; *Brisbane v. Dacres*, *supra*; *Duke de Cadaval v. Collins*, 4 Ad. & E. 858; *Elliott v. Swartwout*, 10 Peters, 137, 153; *Downs v. Donnelly*, 5 Ind. 496; *Carr v. Stewart*, 58 Ind. 581; *Lewellen v. Garrett*, 58 Ind. 442 (26 Am. R. 74); *Ripley v. Gelston*, 9 Johns. 201 (6 Am. Dec. 271); *Clinton v. Strong*, 9 Johns. 370.

But although a mistake purely of law is no ground of relief even in equity, yet it may be connected with such circumstances as will entitle the party to relief. 1 Story Eq. Jur., section 134; *Carley v. Lewis*, 24 Ind. 23. In *Beaver v. Trittipso*, 24 Ind. 41, it was held that where there was no mixture of fraud or imposition in the transaction, there could be no relief upon the mistake. In 1 Story Eq. Jur., section 151, it is said: "Where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance \* \* \* is treated as laying no foundation for equitable interference."

In *Town of Ligonier v. Ackerman*, 46 Ind. 552, 558 (15 Am. R. 323), this court said: "The ultimate fact to be reached in the case is the state of mind under which the payments were made. If they were made voluntarily, with a full knowledge of all the facts and without fraud or imposition, they are beyond reclamation. If, on the other hand, the money was extorted from the appellee, \* \* \* or if fraud or imposition was practiced upon him, he is entitled to receive his money back, for the plain reason that the payment was involuntary." See, also, *Bales v. Hunt*, 77 Ind. 355.

The complaint in the case at bar shows that the judgment of the justice was void; it was a judgment rendered upon an award; the appellant, in his brief, claims that it was a valid

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judgment rendered under sections 22, 23, 24 and 25 of the statute of arbitrations, 2 R. S. 1876, p. 323.

These sections are the same as sections 851, 852, 853 and 854, R. S. 1881; they require a submission by rule of court, and that the award shall be entered on the order-book; this court has held that a submission to arbitration can not be made a rule of the justice's court. In *Richards v. Reed*, 39 Ind. 330, this court said: "We are very clearly of the opinion that a submission under our statute to arbitration or umpirage can not be made a rule of the court of the justice of the peace, and as the court must be designated in the submission, and as the award must be filed in the court designated, it results that the justice of the peace possessed no power or jurisdiction to render judgment on the said award, and that such judgment was null and void."

Although a justice's court is a court of record (*Hooker v. State, ex rel.*, 7 Blackf. 272), yet it is a court of limited jurisdiction, whose proceedings are not valid unless authorized by statute. *Willey v. Strickland*, 8 Ind. 453.

The complaint therefore shows that here was a false claim upon a void judgment, and that the false representations and threats which induced the plaintiff to pay the money were made by the defendants, one of them a public officer, the justice of the peace, who had rendered the void judgment. The parties were not upon equal terms. The complaint alleges that here was on one side a poor sick widow, in great affliction and ignorant of her rights, and on the other side the justice of the peace, with his color of legal authority, acting together with the other defendant, threatening to sell the widow's property under a void execution and trying to make her believe that she could not avoid the payment of it. The complaint shows a strong case of money improperly obtained by false representations and imposition, and undue advantage taken of the situation of the party paying it.

The appellant claims that the complaint was insufficient because it does not expressly aver that the plaintiff did not owe

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the money she paid, but the complaint shows that the judgment was void, and that, therefore, nothing could be due upon it.

There was no error in overruling the demurrer to the complaint. It stated a sufficient cause of action.

There was no error in overruling the motion for a new trial. The appellant claims that the evidence shows a payment purely voluntary. We can not weigh the evidence; it was conflicting; but there was evidence fairly tending to sustain the finding of the court upon every material point involved in it; therefore the finding must stand. *Weaver v. State*, 83 Ind. 289; *Frank v. Purkhiser*, 83 Ind. 496. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellant still insists that the complaint was insufficient, and that the evidence did not support the finding.

The complaint showed that the payment was involuntary, and was unjustly procured when nothing was due, by false representations and imposition, and undue advantage taken of the situation of the plaintiff.

As to the evidence, the petition asserts that the money was paid by the plaintiff under the advice of her attorney, and was therefore voluntarily paid; but the evidence is that when the plaintiff paid the money her attorney was absent the entire day, and that while the payment was insisted on she begged for time to see her attorney until the next day, or until six o'clock the same evening, and could not get it, and that she never owed the appellant anything.

If the court, trying the case without a jury, believed the testimony on behalf of the plaintiff, it fully sustained the complaint.

The trier of the fact must determine the credibility of the

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Anderson Building, Loan Fund and Savings Ass'n No. 2 *et al.* v. Hoppes.

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witnesses, and where there is evidence which supports the finding, it can not be disturbed because of conflicting testimony. *Taggart v. McKinsey*, 85 Ind. 392.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

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No. 10,202.

THE ANDERSON BUILDING, LOAN FUND AND SAVINGS  
ASSOCIATION NO. 2 ET AL. v. HOPPES.

MORTGAGE.—*Foreclosure.*—*Plea of Former Recovery.*—*Judgment Outside of Issues.*—Where suit is brought upon a note and mortgage before their maturity, and it is alleged in the complaint that by reason of the mortgagor's non-payment of certain assessments, dues, interest and fines, the note and mortgage had become due, and the only issue in the cause is formed by a general denial, and there is a finding and judgment upon the issue for the defendant, such judgment is conclusive only upon the question that the mortgagor was not in default at the commencement of such suit in the payment of any assessments, dues, interest or fines, and not as to the payment or satisfaction of the mortgage.

SAME.—*Satisfaction of Mortgage.*—*Judgment as Evidence.*—The judgment so rendered upon such issue will not constitute sufficient evidence, in a subsequent suit by the owner of the mortgaged premises, to entitle him to a judgment for the satisfaction of the mortgage, or to quiet his title against such mortgage.

From the Madison Circuit Court.

*M. S. Robinson* and *J. W. Lovett*, for appellants.

*C. L. Henry* and *H. C. Ryan*, for appellee.

Howk, J.—This was a suit by the appellee against the appellants, to obtain the satisfaction of record of a certain mortgage, alleged to have been executed by Philip and Eliza Keller to the Anderson Building, Loan Fund and Savings Association No. 2, on certain real estate in the city of Anderson, of which the appellee claimed to be the owner. In his com-

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plaint the appellee also asked that a certain tax sale of such real estate might be set aside and held for naught, and that his title to the real estate might be forever quieted and set at rest. The cause was put at issue and tried by a jury, and a verdict was returned, in substance, as follows: "We, the jury, find for the plaintiff, and that he have his title quieted to the real estate described in the complaint, and that the defendant recover the sum of \$34, as and for taxes paid on said real estate." Over appellant's motion for a new trial, and its exception saved, the court rendered judgment on the verdict, and as prayed for in appellee's complaint.

Several errors are assigned upon the record; but the appellant's counsel, in their brief of this cause, have expressly limited their argument to the questions presented by the alleged error of the court in overruling their motion for a new trial. The point is made and pressed with much earnestness and ability by appellant's counsel, that the verdict of the jury was not sustained by sufficient evidence and was contrary to law. Before considering or passing upon this point, it is necessary, we think, that we should first give a summary at least of the pleadings in the cause.

In his complaint the appellee alleged, in substance, that on the 11th day of February, 1875, Eliza Keller being then the owner of the real estate described in the complaint, she and her husband, Philip Keller, executed a mortgage on such real estate to the appellant, the Anderson Building, Loan Fund and Savings Association No. 2, to secure the payment, when the same became due, of the sum of \$1,000, which mortgage was recorded in the mortgage records of Madison county; that afterwards the mortgagors having failed to comply with the conditions of the mortgage, by reason of which the mortgage debt became due, the mortgagee instituted suit in the court below to foreclose the mortgage; that upon the trial of such suit, afterwards had, there was a finding and judgment for the mortgagors, the Kellers, the defendants therein, and against the mortgagee, the association, the plaintiff therein;

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that by such finding and judgment the said mortgage was declared satisfied, but that it had never been satisfied of record in the county records; and that the record of such mortgage, although satisfied, was a cloud upon appellee's title to such real estate. The complaint contained other allegations, in relation to other matters, which we need not notice in this opinion. For it is conceded by appellee's counsel in argument, "That the only question in the case in the court below, and the only one presented in this court, is whether appellee was entitled to have his title to said real estate quieted against appellant's said mortgage, and the record of the same entered satisfied." We have given all the averments of the complaint bearing on this question, and it will be noticed therefrom that it was not claimed that the mortgage debt, or any part of it, had ever been paid to the appellant, or to any one else, but the appellee claimed to have the mortgage entered satisfied of record, upon the ground of the alleged former adjudication to that effect, stated in his complaint.

The appellant answered the complaint in this case in two paragraphs, of which the first was a general denial. In the second paragraph of its answer the appellant alleged, in answer to so much of the appellee's complaint as demanded satisfaction of the mortgage to the appellant mentioned therein, that the alleged suit was instituted by the appellant for the foreclosure of its mortgage, for the reason that there were unpaid assessments, dues, interest and fines, claimed to be due it from the mortgagors, the Kellers, the defendants therein; that the note secured by the mortgage, by its terms, was not to be due until February 9th, 1883, unless there should be a failure to pay dues, assessments, fines or interest, as stated in the note and mortgage, and the rules, by-laws and constitution of the association; that the only pleadings in such suit were the complaint and the answer by a general denial; that the only issue in such suit, litigated and tried, was whether there had been any default in the payment of dues, fines, as-

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assessments or interest, and that upon this issue there was a finding and judgment rendered for the defendants in such suit.

And the appellant averred that the court did not adjudge or decree that the mortgage debt was paid or satisfied, and did not decree or order the satisfaction of the mortgage; and that the debt secured by the mortgage was wholly unpaid, etc.

To this second paragraph of answer appellee replied by a general denial.

With this statement of the issues in the case in hand, we proceed now to the consideration of the sufficiency of the evidence to sustain the verdict. The first question which presents itself in considering the evidence is this: What was in issue, and what may be said to have been adjudicated in relation to the appellant's mortgage from the Kellers in the suit mentioned in appellee's complaint? The evidence tended to show that the suit in question was commenced by the appellant against the Kellers in the court below on the 27th day of September, 1876, more than six years before the note secured by the mortgage would have matured and become due, if its terms and conditions had been complied with by the Kellers; that the terms and conditions of the note were, that "in case the monthly interest, weekly dues, fines or assessments, or any part thereof, shall remain unpaid for three months after the same become due, then this note shall become due and collectible; but in case said interest and dues, fines or assessments shall be kept paid up, then the principal of this note shall become due in eight years from date," etc.; that in the complaint in the suit mentioned it was alleged, among other things, that the defendants therein, the Kellers, had wholly failed and refused to pay the monthly interest on the note and mortgage and the amount secured thereby, and had wholly failed and refused to pay the weekly dues, fines, penalties and assessments according to the constitution and by-laws of said association, and the same had remained due and unpaid for more than three months next preceding the

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Anderson Building, Loan Fund and Savings Ass'n No. 2 *et al. v. Hoppe*.

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filing of such complaint, and that the note had thereby become due and payable under its provisions, and under the constitution and by-laws of said association; that the only answer of the defendants, the Kellers, to the complaint in such suit was a general denial of its allegations; and that upon the trial of the issue thus made in such suit the order-book entry of the trial, finding and judgment of the court therein was, in substance, as follows: "Now come the parties by their attorneys, and this cause being at issue is submitted to the court for trial, without the intervention of a jury, and the court having heard all the evidence, and being well advised in the premises, finds for the defendants; and the court orders that the plaintiff pay the cost of this proceeding."

Upon the evidence it is very clear, we think, that the only matter in issue in the suit mentioned in appellee's complaint in this case was whether or not the defendants, the Kellers, at the time of the commencement of such suit were and had been for three months next preceding in default in the payment of the monthly interest, weekly dues, fines or assessments, or any part thereof. Under the issue joined in such suit, this was the only matter tried and adjudicated by the court, as shown by its finding and judgment therein, as the same were given in evidence. The payment and satisfaction of the note and mortgage were not in issue in such suit, and, therefore, it can not be said, we think, that the finding and judgment of the court therein were, in any sense, an adjudication of the payment of the note, or of the satisfaction of the mortgage. When the court found, as it must have found, that the defendants had not been in default for three months preceding the commencement of the suit in the payment of the monthly interest, weekly dues, fines or assessments, or any part thereof, that was an end of such suit; and as to the matter thus found, but no other, the judgment of the court was a final and conclusive adjudication.

We are of opinion, therefore, that the finding of the court

## Jones v. White.

in the case at bar was not sustained by the evidence, and was contrary to law; and that for this cause the appellant's motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

No. 8837.

## JONES v. WHITE.

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**ATTORNEY AND CLIENT.**—*Liability of Attorney for Want of Skill or Care.*—An attorney whose ignorance or carelessness results in loss to his client is liable in damages to the client.

**SAME.**—*Complaint.*—*Negligence.*—A complaint against an attorney to recover damages for loss shown to have resulted from the ignorance and negligence of the attorney need not show that the plaintiff was without fault.

**PLEADING.**—*Defects Cured After Verdict.*—A complaint which states a good cause of action generally, though defectively, is good after verdict.

**SAME.**—*Negligence.*—A complaint for damages on account of negligence, averring it in general terms without stating the specific facts constituting it, is good on demurrer.

From the Ripley Circuit Court.

*G. Durbin, S. M. Jones, E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.*

**ELLIOTT, J.**—The complaint of the appellee charges that she employed the appellant to conduct, as her attorney, an action of replevin; that he undertook to do so, but so negligently and ignorantly conducted the proceedings that the action was dismissed on appeal to the circuit court, for the reason that the appellant had negligently and unskilfully drawn the bond required of the plaintiff in such cases.

An attorney who undertakes to prosecute an action for a client must possess and exercise skill and care, and if he undertakes, without possessing such skill, or fails to use it, he is

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liable for all loss resulting to his client. One who does not possess sufficient skill to properly prepare an undertaking required by a plain statute, must respond in damages to a client who suffers from his ignorance. On the other hand, if the attorney possesses the knowledge and negligently fails to use it, he must answer for his carelessness.

The complaint was not assailed either by demurrer or motion in the court below, but is here attacked for the first time by the assignment of errors. It is a familiar rule that many defects which a demurrer would reach are cured by a verdict. Where there are general averments covering the ground upon which the cause of action is based, but a failure to make proper averments of specific facts, the general rule is that these facts will, after verdict, be supplied by intendment. *Jenkins v. Rice*, 84 Ind. 342; *Newman v. Perrill*, 73 Ind. 153.

In the present case, the general averment that the bond was ignorantly and carelessly prepared is sufficient after verdict; for, under the settled rule of pleading, we must infer that the evidence properly showed the specific defect in the bond. *Newman v. Perrill*, *supra*, authorities cited. The case falls within the rule stated by the court in *Shimer v. Bronnenburg*, 18 Ind. 363, where it was said: "After verdict the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. Where a fact must necessarily have been proved at a trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof."

There are facts stated from which the ownership of the property sought to be recovered in the replevin action may be indirectly inferred, and this is sufficient to make the complaint good against an attack made after verdict. *Peck v. Martin*, 17 Ind. 115; *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261; *Smock v. Harrison*, 74 Ind. 348.

It has long been the rule in this State, that a complaint is not bad on demurrer, which avers negligence in general terms

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without stating the specific facts constituting the negligence. Where negligence is averred in general terms and the defendant desires a more specific statement, his remedy is by motion and not by demurrer. *Indianapolis, etc., R. R. Co. v. Keeley*, 23 Ind. 133; *Jeffersonville, etc., R. R. Co. v. Dunlap*, 29 Ind. 426; *Indianapolis, etc., R. R. Co. v. Hamilton*, 44 Ind. 76; *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297.

The complaint shows that the adverse decision in the replevin case was because of the insufficiency of the bond, and that the dismissal of the action compelled the appellee to pay a large amount of costs, and for this amount the complaint was certainly good, and, if good to this extent, will repel the attack here made, for it is well settled that a complaint which entitles the plaintiff to some relief, although not to all claimed, will be upheld.

Where a client sues an attorney for negligently conducting legal proceedings, or for undertaking to conduct them without possessing proper skill, and shows in his complaint, that the proceedings resulted adversely to him because of the attorney's ignorance and carelessness, it is not necessary to allege that the plaintiff was without fault. In averring the wrongful act of the attorney, and that the loss resulted from it, the plaintiff sufficiently shows that his own act did not contribute to the injury. We do not mean to hold that the general rule applicable to ordinary cases of negligence governs cases of this class, but, leaving that question undecided, we hold that where the complaint shows the proximate cause of the loss to be the attorney's want of skill or neglect to exercise it, the formal allegation that the plaintiff was without fault is not essential.

We do not think any error was committed in striking out the second paragraph of the answer, for the reason that the matters pleaded were clearly admissible under the general denial contained in the first paragraph of the answer.

Judgment affirmed.

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No. 10,880.

## CLEVINGER v. THE TOWN OF RUSHVILLE.

TOWNS.—*Justice of the Peace.—Jurisdiction.*—The jurisdiction of a justice of the peace of suits to recover penalties for the violation of town ordinances extends to the sum of \$200, as in other civil actions.

SAME.—*Liquor Selling.—License.—Statute Construed.*—It is not an offence against the laws of the State to sell intoxicating liquor without a town license, and hence section 1640, R. S. 1881, does not prohibit the recovery of a penalty for violation of a town ordinance on that subject.

SAME.—*Ordinances.—Pleading.—Exhibits.*—A complaint to recover a penalty for violation of a town ordinance must exhibit or copy so much of the ordinance as relates to the subject, *e. g.*, where one section provided a penalty for selling liquor without a town license, while another made provisions for obtaining such license and the amount to be paid, both sections should be shown.

From the Rush Circuit Court.

*J. Q. Thomas, J. J. Spann and J. W. Study, for appellant.*  
*W. A. Cullen and B. L. Smith, for appellee.*

HAMMOND, J.—Action by the appellee against the appellant, commenced before a justice of the peace, for violating a town ordinance prohibiting, within the corporate limits, the sale of intoxicating liquors in a less quantity than a quart at a time without license from the town.

The justice, on the appellant's motion, quashed the complaint. In the court below, on appeal, the appellant's demurrer to the complaint was overruled.

There was a trial by the court, and a finding and judgment for the appellee for the recovery of \$100, being the penalty provided in the ordinance for its violation. The appellant's motion for a new trial was overruled, and an exception taken, but, as this motion is not in the record, we must presume that the court's ruling thereon was correct.

The overruling of the appellant's demurrer to the complaint, his exception thereto, and his assignment of errors in this court, present two questions, *viz.* :

1. Was the action in this case to recover the penalty of

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Clevenger v. The Town of Rushville.

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\$100 for violating the appellee's ordinance in the jurisdiction of a justice of the peace?

2. Did the appellee's complaint state facts sufficient to constitute a cause of action?

An action to recover a penalty for violating an ordinance of a municipal corporation is a civil action. *Town of Brookville v. Gagle*, 73 Ind. 117, and cases therein cited. The jurisdiction of a justice of the peace in such an action is, therefore, governed by the statute regulating his proceedings in civil cases. In these cases he has jurisdiction where the amount of the recovery does not exceed \$200. Section 1433, R. S. 1881. The justice of the peace had jurisdiction in this case.

As to whether the complaint states facts sufficient to constitute a cause of action, a question is raised as to the validity of the ordinance. Clause 7 of section 22 of the act for the incorporation and organization of towns, as amended in 1877, authorizes the board of trustees of an incorporated town to license, regulate and restrain the sale of intoxicating liquors within the corporation, limiting the license fee to a sum not exceeding the amount required by the statutes of the State for license to sell intoxicating liquors. Section 3333, R. S. 1881. Before the amendment of the above section, incorporated towns, as was held in a number of decisions of this court, had no legal authority to exact a license fee for retailing intoxicating liquors. But this authority is amply conferred by the amendment of the statute in 1877. The ordinance upon which this suit was based was passed February 20th, 1882.

The appellant, however, earnestly insists that the ordinance, so far as it makes it penal to sell intoxicating liquors in a less quantity than a quart, without license from the town, is in conflict with section 1640, R. S. 1881, which went into force September 19th, 1881. This section provides that "Whenever any act is made a public offence against the State by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be

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null and void, and all prosecutions for any such public offence as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the State law only."

We are of the opinion that this section does not affect the validity of the ordinance. The sale of intoxicating liquor, less than a quart at a time, is not of itself an offence, either against the State under the laws of the State, nor against the town under the ordinance. To be an offence against the State, the sale must be made without license under the laws of the State; and, to constitute an offence against the town, such sale must be made without license from the town. There is no penal statute of the State against selling intoxicating liquors without a license from an incorporated town. If the appellee's ordinance attempted to make it an offence to sell intoxicating liquors without license under the laws of the State, such ordinance would conflict with section 1640 above, and would be void. But as the ordinance makes it penal only where the sale is without license from the town, it does not cover the ground of any penal statute of the State. We think that section 1640, *supra*, was not intended to apply to a city or town ordinance like that under consideration, but rather to ordinances that attempt to attach penalties to acts which, in and of themselves, are criminal under the laws of the State. *Zeller v. City of Crawfordsville*, *post*, p. 262.

No part of the ordinance in controversy, except the 14th section, was set out in the appellee's complaint. This section provides that "Any person, or persons, not being licensed according to the preceding section, who shall sell," etc., "shall \* \* \* be fined," etc. Evidently, the preceding section had some relation to the mode of procuring the license, and probably fixing the amount of the fee to be paid therefor. This section should also have been copied in the complaint or a copy of it filed as an exhibit with the complaint. Courts do not take judicial notice of ordinances of incorporated towns. Where a suit is predicated upon any such ordinance, so much

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of it as relates to the action must be set out in or with the complaint. *Green v. City of Indianapolis*, 22 Ind. 192; *Green v. City of Indianapolis*, 25 Ind. 490; *Schwab v. City of Madison*, 49 Ind. 329.

Counsel for appellee call our attention to section 3066, R. S. 1881. But this section applies only to cities. It provides that in actions brought by a city to recover a penalty incurred under an ordinance, "it shall not be necessary to file with the affidavit or complaint a copy of the ordinance \* \* \* charged to have been violated, but it shall be sufficient to recite in the affidavit or complaint the number of the section charged to have been violated, with the date of its adoption." There is no similar provision in relation to suits to recover penalties under town ordinances. But even if section 3066, *supra*, applied to towns as well as cities, appellee's complaint would still be insufficient. In *Whitson v. City of Franklin*, 34 Ind. 392, it was held that the complaint was bad if it did not refer to all the sections of the ordinance relating to the cause of action.

It is proper to observe that section 3066, *supra*, which is section 19 of the act relating to cities, was passed March 14th, 1867, which was subsequent to the decisions in *Green v. City of Indianapolis*, *supra*; but we hold those cases authority in suits by incorporated towns, as there is not, as to such suits, any statute dispensing with a copy of the ordinance, or part of the ordinance charged to have been violated. For failing to file with its complaint a copy of all the ordinance having reference to the charge made against the appellant, the appellee's complaint was insufficient and the demurrer to it should have been sustained.

Judgment reversed, at the appellee's costs, with instructions to the court below to sustain the appellant's demurrer to the appellee's complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and for further proceedings in accordance with this opinion.

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No. 10,688.

## ZELLER v. THE CITY OF CRAWFORDSVILLE.

INTOXICATING LIQUOR.—*Cities.—Crimes.—Criminal Law.—Statute Construed.*

—Selling liquor without a city license is not a public offence by statute, and section 1640, R. S. 1881, does not forbid punishment therefor under an ordinance of the city.

SPECIAL FINDING.—*Agreed Facts.—Statute Construed.—Supreme Court.*—A special finding of facts made by the court without request is not governed by section 551, R. S. 1881; nor is an agreement as to the facts, which is used merely as evidence upon the trial, an agreed case under section 553, upon which an exception to conclusions of law will present any question to the Supreme Court.

From the Montgomery Circuit Court.

*J. R. Courtney*, for appellant.

*A. Campbell* and *E. C. Snyder*, for appellee.

BICKNELL, C. C.—This was an action before the mayor of Crawfordsville to recover a penalty for the violation of a city ordinance. The ordinance provides that any person who shall sell, barter, or give away, within the city limits, or within two miles thereof, any spirituous, vinous or malt liquors, in a less quantity than a quart at a time, to be used or drunk on the premises, without having first procured from the clerk of the city a license so to do, shall, on conviction thereof, forfeit and pay a penalty of not less than ten nor more than fifty dollars for each offence.

The ordinance was passed in 1878. This action was commenced in 1882. The complaint alleged a violation of the ordinance on the 18th of January, 1882. The mayor rendered judgment for \$10 against the defendant, who appealed to the circuit court. There a motion by the defendant to dismiss the action was overruled, and upon an agreed statement of facts the court found for the plaintiff \$10.

The defendant made no motion for a new trial, but excepted to the finding and judgment, and to the alleged conclusions of law. On appeal to this court he assigns errors as follows:

1. Overruling the motion to dismiss the suit.

90	262
127	78
90	262
127	78

90	262
157	391

90	262
169	15
169	16

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2. Error in the finding and conclusions of law upon the agreed statement of facts, and in rendering the judgment.

The only objection made to the complaint is that the act made penal by the ordinance is a misdemeanor by the State law, and that therefore the ordinance is void under section 1640 of the R. S. 1881.

Said section provides that "Whenever any act is made a public offence against the State by any statute and the punishment prescribed therefor, such act shall not be made punishable by any ordinance of any incorporated city or town; and any ordinance to such effect shall be null and void, and all prosecutions for any such public offence as may be within the jurisdiction of the authorities of such incorporated cities or towns, by and before such authorities, shall be had under the State law only."

The act made penal by the ordinance in question is selling, etc., without a city license. This act is not punishable as a crime by any statute of the State. The State punishes by fine and by imprisonment the act of selling, etc., without a license from the county commissioners, but does not punish the act of selling, etc., without a city license. R. S. 1881, sections 5312, 5320. Cities have a right to regulate and license all shops and other places kept for the sale of liquors to be used in and upon the premises. R. S. 1881, section 3106, clause 13, and section 3154. They had this right when the ordinance in controversy was adopted. Acts 1873, p. 50. There was, therefore, no error in overruling the motion to dismiss the action.

The other error assigned presents no question. Where, at the request of any of the parties, the court makes a special finding of the facts, and states conclusions of law thereon, under section 551, R. S. 1881, an exception to the conclusions of law will present the questions. *Smith v. Davidson*, 45 Ind. 396. But a finding by the court, not made at the request of any of the parties, is not a special finding under said section 551. *Northcutt v. Buckles*, 60 Ind. 577; *Caress v. Foster*, 62 Ind. 145.

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And where there is a trial by the court, under section 553, R. S. 1881, upon an agreed statement of facts made out and signed by the parties, and accompanied by an affidavit, an exception to the decision at the time it is made will be sufficient without any motion for a new trial. *Fisher v. Purdue*, 48 Ind. 323; *Carlton v. Cummins*, 51 Ind. 478; *Martin v. Martin*, 74 Ind. 207. But where, as in the present case, the proceeding is not under section 551, *supra*, nor under section 553, *supra*, and the agreed statement is used merely as the evidence, no question is presented by a mere exception to the finding and judgment, nor by an exception to alleged conclusions of law. *Slessman v. Crozier*, 80 Ind. 487; *Lofton v. Moore*, 83 Ind. 112. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

90	264
180	89

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No. 9729.

DARRELL v. THE HILLIGOSS, MILLER, MOSCOW AND RUSHVILLE GRAVEL ROAD COMPANY.

GRAVEL ROAD COMPANY.—*Subscription to Capital Stock.*—*Sufficiency of Complaint.*—In a suit by a gravel road corporation against a subscriber to its capital stock, upon his stock subscription, wherein he has agreed to pay a certain sum per share for a certain number of shares of its capital stock, at such times and in such manner as required by its directors, it is not necessary to the sufficiency of the complaint that it should allege the completion of its line of gravel road as described in its articles of association, or that it has constructed or will construct a gravel road upon the line or route described in its articles of association.

PLEADING.—*Answer.*—*Demurrer.*—*Harmless Error.*—Where a demurrer is sustained to a paragraph of answer, and it appears that all the material facts alleged therein could have been given in evidence under another paragraph of answer, which remains in the record, the error in sustaining such demurrer, if it be an error, is harmless, and will not authorize the reversal of the judgment.

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**SAME.**—*Nul Tiel Corporation.*—*Continuance of Corporation.*—*Presumption.*—

Where an answer of *nul tiel corporation* admits the previous existence of a corporation, and alleges no facts sufficient to show that it has ceased to exist, it will be presumed that it is still a corporation and in the possession of its corporate rights, property and franchises.

**SAME.**—*Additional Paragraph.*—*Discretion of Court.*—*Prejudice or Injury.*—

*Supreme Court.*—It is within the discretion of the trial court to allow the plaintiff, after the cause was at issue and set for trial, to file an additional paragraph of complaint; and where the record fails to show that the defendant was prejudiced or injured by such action of the court, the Supreme Court can not say that it was injurious or erroneous.

From the Rush Circuit Court.

*J. Helm, Jr.*, for appellant.

*W. A. Cullen* and *B. L. Smith*, for appellee.

Howk, J.—This was a suit by the appellee against the appellant to recover a balance claimed to be due on his subscription to the capital stock of the appellee. The cause was put at issue and tried by the court, and a finding was made for appellee in the sum of \$133.20, and over appellant's motion for a new trial and his exception saved, the court rendered judgment against him on its finding.

The first error of which appellant complains in this court is the overruling of his demurrer to appellee's complaint. The only objections to the complaint, pointed out in argument by appellant's counsel, are these: 1. It was not alleged in the complaint that appellee had built its line of gravel road from the starting point to the terminal point of such line, as described in its articles of association; and, 2. Nor was it alleged in such complaint, that, at any time before the commencement of this suit, the appellee had constructed, or would construct, a gravel road upon the line or route described in its articles of association. It was not necessary, we think, to the sufficiency of the complaint, that it should have contained either of these allegations. The suit was upon the appellant's subscription to the appellee's articles of association, whereby he agreed to take a certain number of shares of appellee's capital stock and to pay therefor a certain price per share "in

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manner and form and at such times and manner as required by the directors" of the appellee. It was shown in the complaint that appellee's directors had required the payment of all unpaid stock subscriptions at a specified time; that proper notice of such requirement was given, and that a certain balance of appellant's subscription remained unpaid. The complaint was sufficient, and the appellant's demurrer thereto was correctly overruled.

Appellant's counsel next complains of the alleged error of the court in sustaining the appellee's demurrer to the second, third, fourth, fifth, sixth and seventh paragraphs of his answer. Counsel has not discussed this supposed error in his brief of this cause, further than to say that each of the paragraphs, he thinks, constituted a good and sufficient answer to the complaint, and to ask an examination of the averments thereof. We have carefully examined each of these paragraphs of answer, and have reached the conclusion, that, in sustaining the demurrer thereto, the court committed no error available for the reversal of the judgment. The paragraphs objected to might, perhaps, be regarded as argumentative denials of the complaint or some part thereof; but the first paragraph of answer was a general denial, under which the material facts in the other paragraphs might have been given in evidence, and therefore the error, if any, in sustaining the demurrer to such other paragraphs, would be at most a harmless error.

The next error complained of in argument by appellant's counsel is the sustaining of a demurrer to what is called, in the record, his plea of *nul tiel corporation*. In this plea or answer, appellant admitted that he signed appellee's articles of association, as averred in the second paragraph of complaint; and he alleged that the line of gravel road described in appellee's cause of complaint, was to be four miles and fifty rods in length; that the construction of the road was commenced on the — day of —, 1873, and was constructed on the line or route described in the complaint, from the start-

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ing point to a distance of three and two-third miles, from which point appellee ceased to construct its road and abandoned its charter to the residue of its line of road, and surrendered the same to Road district No. —, in Rush county; that more than four years had elapsed since the commencement of the road, and more than six months had elapsed since the completion of the three and two-thirds miles of the road, and that appellee's directors had failed and refused to report the fact of the completion of the three and two-thirds miles of its road, and the costs of construction, to the Secretary of State; wherefore appellant said that the appellee had ceased to be a corporation, and he prayed judgment for costs, etc.

We are of opinion that the court committed no error in sustaining appellee's demurrer to this plea or answer. None of the facts alleged are sufficient to show, we think, that the appellee had ceased to be a corporation; and the fact that it had been a corporation is not controverted, but is rather admitted, in the plea or answer. In the absence of some showing to the contrary, it must be presumed, as it seems to us, that appellee has continued to be and still is a corporation, and, as such, was and still is in the possession of its corporate rights, property and franchises.

It is next insisted by the appellant's counsel that the court erred in permitting the appellee, over his objections, to file a second paragraph of complaint founded on a written agreement, not mentioned in the original complaint, after the cause had been put at issue and set for trial. It was within the discretion of the trial court, we think, to allow the appellee to file such second paragraph of complaint; and the record fails to show that the appellant was, in any manner, prejudiced or injured by such action of the court. In the absence of such a showing, we can not say that the action of the court was injurious or erroneous. *Durham v. Fechheimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546.

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Finally, the appellant claims that the court erred in overruling his motion for a new trial. The only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law. The evidence is not in the record, and, therefore, this alleged error presents no question for our decision.

We have found no error in the record which would authorize us to reverse the judgment.

The judgment is affirmed, with costs.

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No. 10,661.

THE COMMERCIAL NATIONAL BANK v. GILLETTE.

**SALE.—Delivery.—Goods in Bulk.—Title.—Contract.—Performance.**—A sale of personal property constituting a part of a large mass of like property passes no title to the purchaser until it is separated from the mass, or in some other manner designated.

From the Elkhart Circuit Court.

*J. M. Vanfleet*, for appellant.

*J. H. Baker* and *J. A. S. Mitchell*, for appellee.

**ELLIOTT, J.**—The Elkhart Car Company, by a written contract, sold to the appellant 510 car wheels, constituting a part of 1,100 wheels; at the time of the sale the wheels were in one common mass, and there was no separation nor any designation of the wheels sold to the appellant; after the execution of the contract the entire lot of wheels was seized upon executions issued at the suit of appellee, and this action was brought for the possession of those sold.

The contention of appellee is that appellant acquired no title, because the articles sold were not designated or separated from the common lot of which they formed a part, and this contention prevailed in the court below.

There is much strife in the American cases upon this ques-

tion, but none in the English. The weight of the former is, perhaps, with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long established rule of the common-law. In the case of *Bricker v. Hughes*, 4 Ind. 146, the English rule was approved and enforced. In *Murphy v. State*, 1 Ind. 366, the court said: "To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough \* \* that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass." This doctrine found approval in *Scott v. King*, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them *Moffatt v. Green*, 9 Ind. 198; *Indianapolis, etc., R. W. Co. v. Maguire*, 62 Ind. 140; *Bertelson v. Bower*, 81 Ind. 512; *Lester v. East*, 49 Ind. 588, *vide* opinion, p. 594. The rule which our court has adopted is upheld by the American cases of *Hutchinson v. Hunter*, 7 Pa. St. 140; *Haldeman v. Duncan*, 51 Pa. St. 66; *Fuller v. Bean*, 34 N. H. 290; *Ockington v. Richey*, 41 N. H. 275; *Morrison v. Woodley*, 84 Ill. 192; *Woods v. McGee*, 7 Ohio, 467; *McLaughlin v. Piatti*, 27 Cal. 463; *Courtright v. Leonard*, 11 Iowa, 32; *Ropes v. Lane*, 9 Allen, 502; *Ferguson v. Northern Bank*, 14 Bush, 555 (29 Am. R. 418). In Michigan, the rule seems not to be definitely settled, but in a late case it was said: "To the elaborate argument made for the defence to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of *Anderson v. Brenneman*, 44 Mich. 198." *Merchants', etc., Bank v. Hibbard*, 48 Mich. 118; S. C., 42 Am. R. 465.

The civil law rule is the same as that of the common law, and our great lawyers have given it unhesitating approval. 2 Kent Com. 639; Story Sales, section 296.

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The American cases which have departed from the long settled rule, are built on the cases of *Kimberly v. Patchin*, 19 N. Y. 330, and *Pleasants v. Pendleton*, 6 Rand. 473, and these cases proceed upon the theory that commercial interests demand a modification of the rule. In our judgment, commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved. The rule secures real transactions and actual sales, and thus checks the wild spirit of speculation. It prevents, in no small measure, the making of mere wagering contracts; it puts business on a stable basis, and makes it essential that there should be real, and not sham, transfers of property; it makes titles secure, protects creditors and purchasers and represses fraud. If it were granted that the rule does somewhat interfere with the freedom of business transfers, still the good it produces far outweighs this inconvenience. But we do not believe it does interfere with actual business transfers, for common experience informs us that real sales are seldom, if ever, made without a specific designation of the thing bought. The rule may interfere with dealers in "margins," makers of "corners," and framers of "options," and to affirm that it does do this is to give it no faint praise. In principle the rule is sound, and in practical operation salutary.

The efforts made by the courts that have departed from it to make exceptions, to manufacture distinctions and point out differences in order to escape disastrous consequences, affords strong evidence of the wisdom of the rule. The line of decisions in some of the States, where a departure has been taken, is a devious and tortuous one, and this is to be expected when once sound principle is turned from and new rules sought and adopted which have no support in fundamental principles.

We have no disposition to depart from the rule which has so long prevailed in this State and elsewhere.

Judgment affirmed.

Petition for a rehearing overruled.

Sedgwick, Administrator, et al. v. Tucker et ux.

No. 7603.

SEDGWICK, ADMINISTRATOR, ET AL. v. TUCKER ET UX.

**FRAUDULENT CONVEYANCE.**—*Consideration.*—*Husband and Wife.*—Heirs of an intestate made partition by deed of the lands inherited, one of them, at the time indebted beyond his ability to pay, taking a conveyance to himself and wife, as tenants of the entirety. The wife had before that joined in conveyances of her husband's very valuable lands only upon the promise by her husband to pay her the value of her inchoate interest in such lands, and these promises were the consideration moving from her for the conveyance of the lands in question to herself and husband, and there was no actual intent to defraud her husband's creditors.

*Held*, that the conveyance was valid as against the husband's creditors.

**PLEADING.**—*Exhibits.*—A deed referred to in a pleading, but which, though it may be evidence upon the trial, is not the foundation of the action or defence, need not be made an exhibit.

**WITNESSES.**—*Competency.*—*Decedents' Estates.*—Under the act of 1867, when an administrator is a party to a suit growing out of matters occurring after the death of the intestate, the opposite party was a competent witness for himself.

**SAME.**—*Husband and Wife.*—Where husband and wife were joined as parties, each was, under the act of 1867, a competent witness for himself or herself, without reference to the effect of the testimony given upon the interests of the other.

**EVIDENCE.**—*Value of Wife's Inchoate Interest in Husband's Land.*—Where the value of a wife's inchoate interest in her husband's lands is in question, evidence showing the age, health and habits of both is proper.

**SAME.**—*Intention.*—*Conveyance.*—Where it is in question whether an act was done to defraud creditors, it is competent to prove directly by the actor what his actual intention was.

**SAME.**—*Agreement.*—*Husband and Wife.*—*Competency of Witness.*—An agreement between husband and wife might, under the act of 1867, be proved by the wife, the same not being a confidential communication.

**CONTRACT.**—*Statute of Frauds.*—*Consideration.*—*Moral Obligation.*—*Deed.*—A parol promise which, by reason of the statute of frauds, can not be enforced, if the circumstances be such as to impose a moral obligation, will be a sufficient consideration to support a conveyance of lands.

**INSTRUCTIONS.**—Where upon the evidence there is really but one question fairly debatable, it is not error to instruct the jury that that is the controlling question.

**SAME.**—*Fraud.*—That "fraud is never presumed," if said by the court to the jury under such circumstances that it would be understood merely that fraud can not be found without some evidence of its existence, is not available error.

90	271
126	230
90	271
148	108
90	271
153	691

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Sedgwick, Administrator, *et al.* v. Tucker *et ux.*

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From the Shelby Circuit Court.

*O. J. Glessner, E. S. Stillwell, T. B. Adams and L. T. Michener*, for appellants.

*T. W. Woollen and D. D. Banta*, for appellees.

NIBLACK, C. J.—This was a suit for an injunction. The complaint averred that the plaintiffs, William H. Tucker and Aurilla Tucker, were husband and wife, and the joint owners and tenants by entirety of the undivided seven-eighths parts of certain lands in Shelby county, of which a particular description was given, and which were conveyed to them jointly by William Clark and others, heirs at law of Ephraim Tucker deceased; that in March, 1876, Matthew Sedgwick, as the administrator of the estate of the said Ephraim Tucker, recovered judgment in the Shelby Circuit Court against the plaintiff William H. Tucker and one James J. Tucker, for about the sum of \$1,658.70; that the said Sedgwick had since caused an execution to be issued on such judgment, and to be placed in the hands of Albert McCorkle, sheriff of said county of Shelby, ordering him as such sheriff to levy said execution on the lands described in the complaint; that McCorkle, as such sheriff, had levied such execution on said lands, and had advertised the same for sale; that said lands were not subject to levy and sale to satisfy said judgment, but that a sale of them would be a cloud upon the title of the plaintiffs thereto. The prayer was that Sedgwick and McCorkle should be enjoined from selling the lands thus levied upon to satisfy the judgment recovered by Sedgwick as above stated.

The defendants answered in three paragraphs:

1st. That said William H. Tucker was an heir of Ephraim Tucker, deceased; that as such heir he inherited an undivided one-eighth interest in the lands described in the answer; that the heirs of said decedent partitioned said lands among themselves by their several deeds thereto; that by such partition the land described in the complaint was assigned to William H. Tucker as and for his interest as an heir to said real estate;

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Sedgwick, Administrator, *et al. v. Tucker et ux.*

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that at his request the deed therefor was made jointly to him and his wife, the said Aurilla Tucker; that there was no other consideration for said transfer than the partition aforesaid; that at the time of making said deed, and long prior thereto, the said William was indebted to said Sedgwick, as administrator aforesaid, on which indebtedness a judgment was afterwards taken for the collection thereof; that the execution mentioned in the complaint was issued upon said judgment and by the sheriff levied upon the lands in the complaint mentioned; that at the time of making said deed said William had not sufficient other property to satisfy the debt aforesaid; that at the time of said levy he had no other property on which said execution could be levied to satisfy said judgment; that the deed to the said William and Aurilla was made at his request, with the intent on his part to cheat, defraud, hinder and delay his creditors—especially the defendant Sedgwick as the administrator aforesaid; and that said Aurilla gave no good or valuable consideration for said conveyance, and that the judgment and execution are unsatisfied and in full force. Wherefore defendants ask that the deed be set aside and annulled, and that the land be declared subject to levy and sale upon said execution.

The second paragraph contains the same averments as the first, with the additional one of notice, on the part of Aurilla, of the fraudulent intentions of said William. The third paragraph is a general denial.

The plaintiffs jointly replied, admitting that the said William H. Tucker was one of the heirs of Ephraim Tucker, deceased, and setting up specially the facts on which they relied in support of their claim of title to the land described in their complaint.

The plaintiff Aurilla Tucker also replied separately to the answer of the defendants, admitting that her co-plaintiff, William H. Tucker, was one of the heirs at law of Ephraim Tucker, deceased, and that as such heir he inherited an one-

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Sedgwick, Administrator, *et al.* v. Tucker *et ux.*

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eightth interest in the lands of which the said Ephraim died seized; that the said William H. Tucker, and other heirs of the said Ephraim, made partition of the lands which descended to them from him, said Ephraim, amongst themselves, and that the lands described in the complaint were set off to the said William H. Tucker as his interest in the landed estate of the said Ephraim; that the conveyance described in the complaint, and referred to in the answer, was thereupon made to the plaintiffs; that at the time of such conveyance the said William H. Tucker was indebted to the defendant Sedgwick, administrator of the said Ephraim's estate upon which indebtedness judgment was afterwards taken against the said William H. Tucker and James J. Tucker as charged; that at the time of such conveyance the said William H. Tucker was indebted in an amount beyond his ability to pay, but averring that long before such indebtedness to the defendant Sedgwick accrued, and long before the judgment upon such indebtedness was rendered, the said William H. Tucker had become indebted to her in the sum of \$808 for money loaned at different times; that the said William H. Tucker had also been the owner of a tract of land in which she, as his wife, had an inchoate interest of the value of \$2,000, which he bargained and sold to one James Cooper for the sum of \$6,500; that she refused to join in the conveyance of said tract of land to the said Cooper unless upon the promise of some compensation for her said inchoate interest; that to secure her co-operation in such conveyance the said William H. Tucker promised to pay her the value of her said inchoate interest, or to convey, or cause to be conveyed, other lands to her of equal value with such inchoate interest; that afterwards the said William H. Tucker, being still her husband, was the owner of an eighty-acre tract of land in Howard county, in this State, which he bargained and sold to Ephraim Tucker and Ethan A. Tucker for the sum of \$1,600, and in which she had an inchoate interest of the value of \$500; that

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Sedgwick, Administrator, *et al.* v. Tucker *et ux.*

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she refused to unite with her said husband in conveying said tract of land to the purchasers thereof, unless he would promise to compensate her for her said inchoate interest; that he thereupon agreed either to so compensate her in money, or to convey, or cause to be conveyed, to her other lands; that upon such promises she united with her said husband in the execution of a deed to the purchasers aforesaid; that at the time partition was made of the lands of which Ephraim Tucker died seized, and for the purpose of repaying to her the money she had loaned to her said husband, with the interest thereon, and for the purpose of compensating her for relinquishing her inchoate interests in the lands sold by him as above stated, and for the purpose of inducing her to unite with him in the execution of the necessary deeds to the other heirs of the said Ephraim, her said husband promised and agreed with her that he would cause all the interests of such other heirs in the lands set off to him to be conveyed to her, but that the said other heirs of the said Ephraim Tucker refused to convey their interests in the lands so set off to her said husband to her, and instead of so conveying their said interests they executed a deed for such interests to her and her said husband as averred in the complaint; that she thereupon accepted such deed in part discharge of the indebtedness of her said husband to her; that at the time of the rendition of the judgment against the said William H. Tucker and James J. Tucker, described in the complaint, the said James was, and ever since has been, solvent and able to pay all his debts, and was then, and has continued to be, the owner of property, both real and personal, worth the sum of \$10,000 over and above his indebtedness; that the said James J. Tucker was one of the heirs of the said Ephraim Tucker, and with full knowledge of the fact that he was then sued on the notes executed by him and the said William upon which the above named judgment was afterwards rendered against the said William and him, and with full knowledge of the financial condition of the

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said William, not only advised the execution of the deed to her and her said husband, referred to in the complaint, but joined in the execution of said deed.

In further reply, she, the said Aurilla Tucker, denied that said deed was executed with any intent on her part or on the part of her said husband, to hinder, delay or defraud any of his, the said husband's, creditors. She also denied every allegation in the answer not herein admitted.

The defendants demurred separately to both paragraphs of the reply, and their demurrer was sustained to the first or joint paragraph, and was overruled as to the second or separate paragraph of the plaintiff Aurilla Tucker.

Trial by jury. Verdict for the plaintiffs. Motion for a new trial overruled. Judgment enjoining and restraining the defendants from either selling or attempting to sell the joint interests of the plaintiffs in the lands described in the complaint, to satisfy the judgment in favor of defendant Sedgwick.

Error is assigned upon the overruling of the demurrer to the separate reply of Aurilla Tucker, and upon the refusal of the court to grant a new trial.

It is objected, first, to the sufficiency of the reply of Mrs. Tucker, that the facts admitted and reiterated by it showed that the lands in controversy came to her husband by descent, and that, by the partition of the lands of Ephraim Tucker, that particular tract was first set off and assigned to him by parol; that he had hence acquired title to it in severalty before the deed was executed to him and to her jointly by the other heirs; that for that reason the deed was inoperative to convey any title to her, or to confer any new or different title upon him.

The answer, however, alleged that the heirs of Ephraim Tucker partitioned his "lands among themselves by their several deeds thereto," and that allegation was in effect admitted and re-asserted by the reply.

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The plain inference, therefore, is that the partition was made by the mutual execution of deeds between the heirs, and not by parol.

It is next objected that a copy of the deed under which the appellees claimed title ought to have been filed with the reply, and that for that reason the paragraph was bad upon demurrer.

Neither Sedgwick nor McCorkle having executed the deed, it was not binding as a contract upon either of them, and hence was not the foundation of the action within the meaning of section 78 of the Code of 1852. It constituted only evidence of title, which does not have to be filed with the pleadings. *Stout v. Stout*, 77 Ind. 537; *Stribling v. Brougher*, 79 Ind. 328; *Smith v. King*, 81 Ind. 217.

It is further objected that the reply, at all events, showed that there was no sufficient consideration for the inclusion of the name of Mrs. Tucker in the deed under which she claims, nor for the execution of the deed in the form in which it was made.

This objection appears to us to be also untenable.

The reply contained facts establishing an indebtedness by the appellee William H. Tucker, to his wife, in a sum apparently quite sufficient to support such a conveyance, and as he, the said William, by the agreement to make partition, became entitled to receive a deed for the land in dispute, it was competent for him to direct that it be conveyed in whole, or in part, to his wife. The averments of the reply made the conveyance, as to Mrs. Tucker, and the benefits which might result to her from it, simply a case of giving preference to one creditor over another by her husband.

We think the court did not err in overruling the demurrer to Mrs. Tucker's separate reply.

The appellants assigned, amongst other things, as causes for a new trial:

1. The admission of William H. Tucker as a witness for the appellees.

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Sedgwick, Administrator, *et al. v. Tucker et ux.*

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2. The admission of Aurilla Tucker as a witness on her own and her husband's behalf.

3. The permission to Rodney F. Phillips to testify to the age, health and habits of William H. Tucker.

4. The permission to the said Phillips to testify to the age, health and habits of Aurilla Tucker.

5. The admission of the evidence of William H. Tucker, as to advancements he had received from his father's estate.

6. The admission of a former partition deed in evidence, in which there was a mistake in the description of the lands intended to be conveyed by it.

7. The permission to William H. Tucker to testify that he did not have the partition deed made to himself and wife with intent to defraud his creditors or any of them.

8. Permitting William H. Tucker to testify to his own age and health.

9. Allowing Aurilla Tucker to testify as to the indebtedness of her husband to her at the time the lands of Ephraim Tucker were divided.

10. Admitting the evidence of Aurilla Tucker as to whether there was an arrangement between her and her husband as to the payment of his indebtedness to her, and as to the manner in which such indebtedness was paid.

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12. The permission to Aurilla Tucker to testify as to her own age and health.

13. Admitting the evidence of William J. Tucker to the effect that he was present when Aurilla Tucker refused to sign the deed to the Cooper farm, and that she was induced to sign the deed by the promise of her husband to compensate her either in money or in land.

14. The giving of certain instructions prayed for by the appellees.

15. The giving of other instructions by the court upon its own motion.

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16. The refusal of the court to give some instructions asked for by the appellants.

In support of the first and second causes for a new trial it is argued that both of the appellees were incompetent as witnesses: *First*, because being husband and wife they could not lawfully testify, either for or against each other. *Secondly*, because the matters in controversy pertained to the assets of an estate of a decedent.

In answer to the first objection, it may be said that the action being in favor of the appellees jointly, each had the right to testify without reference to the effect which might result to the interests of the other. *McConnell v. Martin*, 52 Ind. 434; *Clouse v. Elliott*, 71 Ind. 302; *City of Lafayette v. Larson*, 73 Ind. 367.

As to the second objection, the answer is that the controversy was concerning matters which had arisen since the death of Ephraim Tucker. This brought the case within the exception contained in the second section of the act of March 11th, 1867, concerning the competency of witnesses, which was in force at the time of the trial of this cause. *Voiles v. Voiles*, 51 Ind. 385; *Clouse v. Elliott, supra*; 2 R. S. 1876, p. 132.

Besides, it was not the object of this suit to obtain a judgment against the estate of Ephraim Tucker within the meaning of the statute. Its only object was to restrain the administrator from causing a particular tract of land to be sold to satisfy a judgment already obtained, which, though nominally for the use of the estate, was within the personal control of the administrator.

The notes upon which the original judgment was rendered having been executed to Sedgwick after he became administrator, he might have sued upon them in his own name only, treating his designation as administrator as a mere *descriptio personæ*, and consequently surplusage. *Savage v. Meriam*, 1 Blackf. 176; *Capp v. Gilman*, 2 Blackf. 45; *Huff v. Walker*, 1 Ind. 193; *Shepherd v. Evans*, 9 Ind. 260.

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A question was made at the trial as to the adequacy of the consideration upon which the name of Aurilla Tucker was included in the partition deed jointly with that of her husband, and, as incidental to the value of the estate which she took under the deed, several witnesses were permitted to testify as to the ages, health and habits of both herself and husband respectively.

We are unable to see that the admission of this evidence was in any manner injurious to the appellants, and hence can not hold that it was erroneously admitted. On the contrary, we see nothing improper in the admission of the evidence under the circumstances. This conclusion meets the objections made by the third, fourth, eighth and twelfth causes for a new trial.

The evidence touching advancements made to William H. Tucker, complained of by the fifth cause for a new trial, and the objections to its admissibility, are so generally and so meagerly set out in the bill of exceptions that we are left in doubt both as to its relevancy and irrelevancy. We can not therefore treat it as having been improperly admitted.

It was made to appear by the evidence that two partition deeds were made to the appellees; that there was a mistake in the description of the lands in the first deed, and that the second deed, upon which the appellees relied for title, was executed to correct and cure the mistake in the first deed. Both deeds were read in evidence at different periods of time at the trial, and it is objected that the reading of the first deed in evidence was erroneous.

In the first place, nothing has been suggested from which we can infer any injury to the appellants by reason of the introduction of the first deed in evidence.

In the next place, the production of that deed tended inferentially to rebut some statements made by one of the witnesses for the appellants. Besides, we know of no reason why it may not have been put in evidence as a link in the appel-

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Sedgwick, Administrator, *et al. v. Tucker et ux.*

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lee's chain of title if they chose to use it in that way. The sixth cause for a new trial was, therefore, not well assigned.

As applicable to the seventh cause for a new trial, it is contended that William H. Tucker ought not to have been permitted to state that he had no intention of defrauding his creditors when he had his wife's name inserted in the partition deed, and authorities are cited in support of that assumption.

It has been held, however, by this court that since parties have been admitted as competent witnesses in a cause, they may, as a legitimate consequence, be permitted to swear to the intent with which they did any material act. *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196); *Bidinger v. Bishop*, 76 Ind. 244; *Parrish v. Thurston*, 87 Ind. 437.

The agreements and stipulations sworn to by Aurilla Tucker as having been made with her husband from time to time concerning their several property interests, and which appeared to have been in all respects very similar to those set up in her separate reply, constituted substantial and independent facts as to which she was competent to testify, and not confidential communications within the meaning of the act of March 11th, 1867, *supra*. *Schaffner v. Reuter*, 37 Barb. 44.

It is not necessary that an agreement or stipulation shall be valid and binding in all respects, to make it a sufficient consideration to support a conveyance. If the circumstances are such as to make it impose a moral obligation only, such an obligation will afford a good consideration for a deed of conveyance without being in writing. *Goff v. Rogers*, 71 Ind. 459; *Brown v. Rawlings*, 72 Ind. 505.

What William J. Tucker testified to was merely corroborative of that which Aurilla had stated as to one item of indebtedness claimed to have been due to her from her husband.

This is all that need be said as to the matters embraced in the ninth, tenth and thirteenth causes for a new trial.

The first instruction given by the court was, in brief, that

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the controlling question was whether the deed relied on by the appellees was or was not fraudulent as to the creditors of William H. Tucker.

Under the pleadings and evidence, that appears to us to have been a fair general presentation of the case to the jury.

The second instruction was more in detail, but in substance the same as the first, and for the same reason we see no objection to it. We think the only really debatable question between the parties was the good faith of the last partition deed to the appellees.

The third instruction told the jury that "fraud is never presumed."

It is claimed that this declaration is too broad and unlimited in its terms; that upon the establishment of certain facts fraud will be presumed.

As applicable to conveyances alleged to have been fraudulent, the question as to the fraudulent intent was a question of fact for the jury. 1 R. S. 1876, p. 506, section 21. The instruction in question was given upon the evident theory that in a case like this fraud could never be presumed as an existing fact, in the absence of any evidence on the subject to which the charge of fraud had reference, and in that view the instruction stated the law of this State correctly. *Leasure v. Coburn*, 57 Ind. 274; *Luce v. Shoff*, 70 Ind. 152.

The appellants urge as one of the strong points relied upon by them, that the evidence made out a case of parol partition only in the first instance, as between the heirs of Ephraim Tucker, that under such parol partition William H. Tucker went into the possession and became seized in his own right of the lands in controversy, and of another forty-acre tract since sold by him, before any deed was made to him and his wife, that the partition deeds, so called, were an after-thought merely, and conferred no new title and no title at all on the wife.

It was shown by the evidence that one of the heirs made a map of the lands left by Ephraim Tucker, and that upon that

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map he marked out a division of the lands into eight equal parts, as nearly as was practicable, situated as the lands were; that at a meeting of the heirs afterwards held it was agreed that these lands so mapped off should be put up to public auction as between themselves, the bonus which might be paid for the respective choices to constitute a fund to be thereafter divided; that at the time the appellee William H. Tucker resided on the land in dispute, which, with another forty-acre tract since sold, as above stated, comprised what was classed as second choice of the respective shares into which it was proposed to divide the entire body of the lands; that William H. Tucker, when the sale took place, bid off the second choice of shares, as above designated, at a bonus of \$375; that all the shares were bid off and disposed of as between the heirs at public sale in that way; that as soon thereafter as practicable the heirs proceeded to make deeds interchangeably for the shares as they were respectively disposed of at the sale above stated; that William H. Tucker was required to pay, and did pay, the bonus of \$375 bid by him for his choice, before he could or did obtain the deed to him and his wife described in the complaint in this cause.

This made a case of plain and undeniable partition by deed, and was even more in the nature of a sale and conveyance as between the heirs than partitions usually are.

While the evidence was conflicting, there was evidence fairly tending to sustain the verdict. What has been said practically disposes of all the material questions presented by the record, whether arising upon the pleadings or the evidence, or upon instructions given or refused, and no sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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The Terre Haute and Indianapolis Railroad Company v. Penn.

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No. 10,744.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. PENN.

**RAILROADS.—Killing Stock.—Complaint.**—A complaint against a railroad company for killing an animal, which, with the other necessary averments, alleges that the railroad "was not securely fenced," is good, and if the railroad could not properly be fenced at the place, the fact is matter of defence, concerning which the complaint need not make any averment.

From the Montgomery Circuit Court.

*J. G. Williams*, for appellant.

*A. D. Thomas*, for appellee.

**HAMMOND, J.**—The appellee sued the appellant in a complaint of two paragraphs. In the first paragraph appellee claimed damages for the killing of a young mare belonging to him. In the second paragraph he claimed damages for the crippling of the same animal. The death and injury complained of were alleged to have been caused and done by the locomotive and cars running upon a railroad used and operated by the appellant, at a place where "said road was not securely fenced, and there were no sufficient cattle-guards."

Answer, the general denial. Trial by jury; verdict for appellee for \$75; motion for a new trial overruled; exceptions; judgment on verdict.

The errors assigned in this court are, that the complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling the appellant's motion for a new trial.

The statutory provisions making railroad corporations, etc., liable for stock killed or injured by locomotives, cars and other carriages running on roads controlled or operated by them, do not apply to any railroad "securely fenced in." Section 4031, R. S. 1881. It is urged that each paragraph of the complaint in this case is defective because of the omission of the word "in" after the word "fenced." But, as already

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decided by this court, the words "not securely fenced" are equivalent to "not securely fenced in." *Detroit, etc., R. R. Co. v. Blodgett*, 61 Ind. 315.

It is further objected to the complaint that it does not aver that the place in question on the appellant's road was where it was required to fence. This averment was unnecessary. If it was not the duty of the appellant to enclose its road at said place, that was a matter of defence. *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426; *Louisville, etc., R. W. Co. v. Kiouss*, 82 Ind. 357.

We think the complaint would have been good on demurrer. It is certainly sufficient on objections coming after verdict. The reasons stated in the appellant's motion for a new trial were, that the verdict was contrary to law and not sustained by sufficient evidence, and that the court erred in giving its oral instructions to the jury. No objection to the instructions are suggested in the appellant's brief, nor do we discover any. They were applicable to the evidence, and stated the law correctly.

The appellee's mare died from an injury which the evidence tended to show was received from a moving freight train on the appellant's road. When first seen after the injury, the animal was lying near the track of the appellant's road, about twenty feet west of the crossing of a public highway. There was evidence showing, that the mare, with a number of horses, was running on the highway in the direction of the railroad, as the train was approaching and crossing the highway. And there was evidence tending to show that the mare ran against one of the cars as it was crossing the highway, and was thrown or carried in the direction of the place where she was found after the injury. But the evidence also tended to show that there was an opening in the fence next to the railroad, through which the horses, as they approached the passing train, entered, and that the mare received the injury after thus leaving the highway. The evidence tended to show that the

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opening in the fence was made some time prior to the injury complained of by the appellant's employes, for the purpose of constructing a ditch by the railroad.

Viewing the evidence as it is set out in the bill of exceptions, we can not say that the trial court erred in overruling the motion for a new trial.

Judgment affirmed, at the appellant's costs.

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 No. 8327.

## SLAUTER v. HOLLOWELL.

**APPEARANCE.**—*Jurisdiction.*—*Abatement.*—After demurrer to a complaint, a plea in abatement questioning jurisdiction over the person will not be entertained, and a demurrer to such plea will be sustained.

From the Warren Circuit Court.

*J. McCabe* and *E. F. McCabe*, for appellant.

*M. Milford*, for appellee.

**BICKNELL, C. C.**—Slauter filed a complaint for a review of a judgment obtained against him by Hollowell in the Warren Circuit Court.

The complaint alleged error of law appearing in the proceedings. A demurrer to the complaint, for want of sufficient facts, was sustained; Slauter excepted and appealed.

The only error assigned is that the court erred in sustaining said demurrer.

In the original action, the appellant filed a demurrer to the complaint, for want of sufficient facts, and said demurrer was overruled; the appellant then filed an answer in three paragraphs, to wit:

1st. The general denial.

2d. Payment.

3d. A verified plea in abatement, alleging that appellant was not a resident of Warren county, but had his residence

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135	153
90	286
146	670
90	286
155	440
90	286
159	77
90	286
164	321

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in Fountain county, Indiana ; wherefore the court had no jurisdiction of his person.

A demurrer to this plea in abatement was sustained, and that ruling is the alleged error of law upon which the complaint for review is founded.

The appellant, having filed a demurrer in the court below, could not afterwards plead in abatement want of jurisdiction over the person ; a demurrer is a full appearance to the action, and admits the jurisdiction of the court over the person. *Kegg v. Welden*, 10 Ind. 550 ; *Knight v. Low*, 15 Ind. 374 ; *City of Crawfordsville v. Hays*, 42 Ind. 200 ; *Louisville, etc., R. W. Co. v. Nicholson*, 60 Ind. 158. The ruling of the court below upon the demurrer to the plea in abatement was not erroneous, and, therefore, the demurrer to the complaint for review was rightly sustained. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—In this case the question is whether a plea to the jurisdiction of the court over the person can be tolerated, after a full appearance without objection, and after the determination of an issue of law by the court ?

In other words, can a defendant, who has deliberately admitted the jurisdiction of the court over his person, deny it afterwards in the same suit ?

There is no jurisdiction of the person of a defendant unless there be either process or a voluntary appearance. *Hawkins v. Hawkins*, 28 Ind. 66 ; *State v. Ennis*, 74 Ind. 17 ; *McCormack v. First Nat. Bank*, 53 Ind. 466.

A full appearance has always been held to admit the jurisdiction of the court over the defendant's person. It was so in England. *Humble v. Bland*, 6 T. R. 255. It was so in In-

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diana before the code. *Shirley v. Hagar*, 3 Blackf. 225; *Lagow v. Patterson*, 1 Blackf. 327; *Eldridge v. Folwell*, 3 Blackf. 207; *Lane v. Fox*, 8 Blackf. 58.

It is so in Indiana under the code. *McCarthy v. McCarthy*, 66 Ind. 128; *Louisville, etc., R. W. Co. v. Storer*, 57 Ind. 559; *Aurora Fire Insurance Co. v. Johnson*, 46 Ind. 315; *Free v. Haworth*, 19 Ind. 404; *Templeton v. Hunter*, 10 Ind. 380. In a very late case, where, on complaint for review, the allegation was that there had been no service of the summons, but the record accompanying the complaint showed an appearance by defendant, it was held that such appearance controlled the averment of want of service. *State v. Holmes*, 69 Ind. 577. In *Collins v. Nichols*, 7 Ind. 447, which was an attachment on the ground of alleged non-residence, it was held that the defendant, after appearance and trial, could not show in any way that he was not a resident of the county when the writ was issued.

In *Louisville, etc., R. W. Co. v. Nicholson*, 60 Ind. 158, this court held, that the court having jurisdiction of the subject-matter, and the defendant having fully appeared without objection, the jurisdiction over the defendant became complete, without any service of process.

There is no hardship in the rule thus universally adhered to. The defendant has a remedy, if there be no jurisdiction of his person. He may appear specially and move to set aside the summons and service. *New Albany, etc., R. R. Co. v. Combs*, 13 Ind. 490. Such a limited appearance waives nothing, and enables him to make other proper motions. *Carson v. Steam Boat Talma*, 3 Ind. 194.

The position is, therefore, impregnable, that under the code, as well as before, a full appearance without objection admits the jurisdiction of the court over the defendant's person, as fully as an agreement in writing would do it. But a demurrer is a full appearance. There never was a time when a party would be permitted to appear specially, for the purpose of demurring; by demurring he demands the judgment of

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Slauter v. Hollowell.

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the court upon a question of law, and can not be permitted afterwards to deny the jurisdiction over his person, which he has thus solemnly invoked.

The code has not changed the law in this respect. In *Kegg v. Welden*, 10 Ind. 550, decided in 1858, this court said: "It is insisted that the court had no jurisdiction of the person of said James. This is a mistake. There was full appearance made when the demurrer was filed."

So, in *Knight v. Low*, 15 Ind. 374, decided in 1860, a general demurrer to the complaint was overruled. The defendant then answered denying personal service of process. A demurrer to this answer had been sustained by the court below, and this court affirmed the judgment.

In *City of Crawfordsville v. Hays*, 42 Ind. 200, decided in 1873, the court held that the filing of demurrers to the complaint amounted to a full appearance to the action. In this case, as in the case at bar, the answer in abatement was filed after demurrers to the complaint had been overruled, and the court said there was no motion in the circuit court to quash or set aside the summons, or the service thereof. Conceding that a defect in the service of process is proper matter for an answer in abatement, still it can not be made available after there has been a full appearance to the action, as in this case. The foregoing cases show that under the decisions of this court, both before and since the adoption of the code, a full appearance by the defendant, without objection, admits the jurisdiction of the court over his person; and they also show that a demurrer to the complaint is a full appearance. But it is claimed that the code allows a defendant to deny jurisdiction over his person, after having admitted it.

The language of the statute is this: "When any of the matters enumerated in section fifty do not appear upon the face of the complaint, the objection (except for misjoinder of causes), may be taken by answer." Civil Code, section 54. One of the matters "enumerated in section fifty" is want of

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jurisdiction of the court over the person. The rule is, that a statute shall not be construed so as to work injustice or inconsistency, but must have a reasonable construction in accordance with the intention of the Legislature, which will not be presumed to have intended that a party may solemnly admit the jurisdiction of the court over his person, and demand its judgment upon a question of law, and then, after a decision of the court against him, deny its jurisdiction over his person. It is suggested that the question to be determined in this case has never been decided in this State, or under any other code, but this is a mistake; the same question was expressly decided in *City of Crawfordsville v. Hays, supra*. It was there held that a plea in abatement, questioning the jurisdiction of the court over the defendant's person, can not be made available after a full appearance by demurrer. See also *Collins v. Nichols, supra*, and *Louisville, etc., R. W. Co. v. Nicholson, supra*. All of these cases were decided under the code.

It is suggested that unless the defendant may contest the jurisdiction of the court over his person after admitting it, he will lose some advantage given him by the statute, but the statute upon the question under examination makes no change as to the effect of admissions. It was the law before, that you could demur or plead but could not do both at once, and that after your demurrer was overruled you could plead "matter which did not appear upon the face of the complaint," but in the nature of things you could not deny jurisdiction over the person after having admitted it, and that rule governs the construction of the statute, just as it governed the former law which the statute substantially re-enacts.

It was always a question whether it would be better to plead or demur, and always, by adopting the one course, the party was compelled to forego some advantage which might be enjoyed, or incur some risk which might be avoided, by the other. Stephen Pl. 151.

The decisions of this court upon the point in question since

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 Buck v. Milford.
 

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the adoption of our code, not only harmonize with the older decisions but they save all the defendant's essential rights.

He may appear specially and make all proper motions; he may appear and plead the want of jurisdiction over his person in abatement; if he appears without objection, and admits the jurisdiction over his person by a demurrer, he may thereby question the sufficiency of the complaint for any of the matters, enumerated in section 50 of the code, which appear upon the face of the complaint; and, if his demurrer be overruled, he may plead any of the matters enumerated in section 50 and not appearing on the face of the complaint, except misjoinder of causes of action, and except that, having expressly submitted to the jurisdiction of the court over his person, he can not again raise the question of such jurisdiction. Whatever would make a statute unreasonable and against natural justice must be regarded as excepted from it. Potter's Dwaris Stat. 238. Certainly, if a defendant should sign and file in court a statement as follows: "I hereby admit the jurisdiction of this court over my person," he could not afterwards deny it by plea, but that admission is no stronger than the admission involved in a demurrer.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Original opinion filed at the November term, 1882.

Opinion on petition filed at the May term, 1883.

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 No. 10,433.

### BUCK v. MILFORD.

PLEA OF ESTOPPEL.—*Sufficiency of Answer.*—*Demurrer.*—*Error.*—It is error to overrule a demurrer to an answer of estoppel, which fails to show that the plaintiff had knowledge of the facts constituting the estoppel, and which does show that the defendant had knowledge, or the means of knowledge, of all such facts.

From the Fountain Circuit Court.

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149	578
90	291
155	402

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Buck v. Milford.

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*S. F. Wood and J. Copner*, for appellant.

*M. Milford*, for appellee.

Howk, J.—This was a suit by the appellant against the appellee, to recover damages for the alleged wrongful and unlawful taking possession and conversion of certain articles of property. The cause was put at issue and tried by a jury, and a verdict was returned for the appellant, assessing her damages in the sum of \$103. The appellee's motion for a new trial was sustained by the court, and to this ruling appellant excepted. The issues joined were then tried by the court, and a finding was made for the appellee, and judgment was rendered accordingly. Appellant's motion for a new trial having been overruled by the court, and her exceptions saved to such ruling, she has appealed from the judgment rendered to this court.

The first error complained of in argument by appellant's counsel is the decision of the court in overruling her demurrer, for the want of sufficient facts, to the second paragraph of appellee's answer. In this paragraph of his answer, the appellee alleged, in substance, that at the respective times of each of the acts complained of in appellant's complaint, he was and since had been the administrator of the estate of Christina Buck, deceased, and, as such administrator, took possession of the property described in the complaint, and made an inventory of the estate of said Christina, of all the personal property of such decedent, including the property described in the complaint; that at the time he made such inventory the appellant was present, stood by and made no claim of title in or to the property contained in such inventory, and the property, contained in the inventory, was all the property appellee took possession of, and was the identical property described in the complaint, and the appellee, in no other way, had possession thereof. Wherefore the appellee said that appellant was estopped to claim title in said property, and ought not to recover in this action.

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We are of opinion that the facts stated in this paragraph were not sufficient to constitute a good answer in estoppel, and that the appellant's demurrer thereto ought to have been sustained. It was not alleged that appellant was fully apprised of her legal rights in the property, described in her complaint, at the time appellee included such property in his inventory of Christina Buck's estate; nor was it alleged, even, that appellant knew, or had the means of knowing, that appellee was including such property in such inventory. It was not alleged that appellee was induced by the presence and silence of the appellant to include the property, described in her complaint, in the inventory of his decedent's estate, and to take possession thereof and convert the same to his own use; indeed, it was not alleged in the paragraph of answer under consideration, that at the time the appellee inventoried, took possession of and converted the property described in the complaint, he did not know, nor have the means of knowing, that such property was owned and possessed by the appellant, in her own right; nor was it alleged that he even believed, or had cause to believe, that such property belonged to the estate of Christina Buck, deceased. It is well settled that, to constitute a valid estoppel by conduct, there must be knowledge on the part of the party sought to be estopped, and a want of knowledge on the part of the party relying upon the estoppel. The converse of this must also be true, that there can be no valid estoppel where there is a want of knowledge on the part of the party sought to be estopped, and knowledge, or the means of knowledge, on the part of the party relying upon the estoppel. *Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424; *Long v. Anderson*, 62 Ind. 537; *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381.

Our conclusion is, therefore, that the court clearly erred in the case at bar in overruling the appellant's demurrer to the second paragraph of the answer.

As this conclusion requires the reversal of the judgment, and, perhaps, the formation of new issues, we need not extend

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this opinion in the consideration of the other errors complained of, as these will hardly occur again on a new trial of the cause.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of answer, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

90	294
126	70
90	294
148	364
148	647
151	561

No. 10,971.

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90	294
168	517

OFFICE AND OFFICER.—*Judicial Office.*—*Constitutional Law.*—*Eligibility to Office.*—One holding a judicial office by election may, under the constitution of the State, R. S. 1881, section 176, be elected to an office, not judicial, the term of which will begin after his judicial term expires.

SAME.—One elected, with his consent, to a judicial office, but who does not accept the office, may, under the constitution, sec. 176, *supra*, be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected.

SAME.—*Definition.*—*Eligible.*—The word *eligible*, in section 16, art. 7, of the State Constitution, means *legally qualified*.

SAME.—*Cases Limited.*—Language found in the opinions in *Waldo v. Wallace*, 12 Ind. 569, *Gulick v. New*, 14 Ind. 93, *Howard v. Shoemaker*, 35 Ind. 111, must be limited to cases where the judicial term would run beyond the commencement of the term of the office, not judicial, to which the person is chosen. ELLIOTT, J., dissents.

From the Benton Circuit Court.

*D. Smith, R. P. Davidson* and *J. C. Davidson*, for appellant.

*T. L. Merrick, R. S. Travis, D. Fraiser* and *F. B. Everett*, for appellee.

ZOLLARS, J.—This case presents for decision a novel, and somewhat difficult question, involving, as it does, the proper construction and application of section 16, article 7, of the State Constitution.

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Upon proper request, the trial court made a special finding of facts.

So far as they need be set out in this opinion they are substantially as follows :

At the general election in 1880, appellee was duly elected for his first term, treasurer of Benton county for the period of two years, from and after August 15th, 1881, was commissioned, duly qualified, entered upon the discharge of the duties of the office, and was so serving at the time of the general election in 1882.

At this last election, appellant, appellee, and one Finly were candidates for the office of treasurer of Benton county, for the term of two years, to commence on August 15th, 1883.

Appellant received a majority of all the votes cast, which was duly certified by the proper board of canvassers.

At the April election in 1878, appellant was elected a justice of the peace in and for York township, in Benton county, for the term of four years, commencing on the 29th day of November, 1878, was duly commissioned, qualified, and was discharging the duties of the office at the time of the general election in 1882.

At the April election in said York township, in 1882, appellant, with his knowledge and consent, was voted for, for the office of justice of the peace for the term of four years, commencing on the 29th day of November, 1882, and received 127 votes, being the whole number of votes cast for that office.

Proper returns were made of this election. On the 18th day of April, the Governor issued a commission to appellant as such justice for a term of four years, from and after the 29th day of November, 1882.

This commission was forwarded to the clerk of the circuit court, where it still remains, appellant never having accepted the same, given bond, or in any way qualified or entered upon the duties of the office for the term so to commence on November 29th, 1882.

On the 27th day of November, 1882, appellant notified

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the clerk in writing that he refused to accept or qualify for the second term as justice of the peace.

The court below found as conclusions of law upon these facts:

*First.* That on the 7th day of November, 1882, appellee was eligible to the office of treasurer of Benton county, for the term to commence on the 15th day of August, 1883.

*Second.* That appellant on November 7th, 1882, was not ineligible to election to said office of treasurer for the term to commence on the 15th day of August, 1883, by reason of his first election, commission and qualification as such justice of the peace from November 29th, 1878, to November 29th, 1882.

*Third.* That appellant was ineligible to election on November 7th, 1882, to the office of county treasurer, for the term commencing August 15th, 1883, by reason of his second election as such justice of the peace for the term of four years, from November 29th, 1882.

*Fourth.* That, by reason of appellant's ineligibility, appellee was elected and entitled to the office of treasurer of the said county, for the said term, commencing on the 15th day of August, 1883.

Judgment was rendered accordingly, declaring appellee, who was the contestor, entitled to the said office of treasurer. From this judgment appellant prosecutes this appeal.

The section of the Constitution above referred to is as follows:

"No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the State, other than a judicial office."

Appellant contends that the ineligibility refers to the right and fitness to be inducted into, and discharge the duties of, an office other than a judicial one, and that the term elected has reference not merely to receiving a majority of votes, but also the acceptance of the office.

And that, hence, although appellant may have been in-

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eligible on the day of election, 1882, by reason of his term of office as justice not having expired, yet, the ineligibility was removed by the expiration of that term on the 29th day of November, 1882, and he might rightfully and legally take and hold the office of treasurer, for the term to commence in August, 1883.

And that, although appellant was, by the proper vote, at the April election, 1882, chosen for a second term as justice, not having filed the bond or taken the oath required by law, he was not by such election rendered ineligible to the office of treasurer.

On the other hand, it is contended by appellee that the ineligibility has reference to the right to be voted for, and that as the term for which appellant had been elected a justice of the peace in 1878 had not expired on the day of election in November, 1882, all of the votes cast for him counted for nothing, and that the subsequent expiration of such term did not render him eligible to the office of treasurer, the term of which did not commence until August, 1883. And further, that having, with his knowledge and consent, received the votes for the office of justice of the peace in April, 1882, and having received a majority of the votes, he was elected, and thus rendered ineligible for four years to hold the office of county treasurer, although he declined the commission, and refused to file a bond, take the oath, or accept the office of justice of the peace.

These conflicting positions are maintained with much learning and ability by the counsel for the respective parties.

After a careful and full examination, we have reached the conclusion that the position of appellant is the correct one in this case, and that the court below erred in its conclusions of law, so far as they relate to the ineligibility of appellant.

"Legally qualified" is the meaning that should be given to the word eligible, as used in the section of the Constitution under consideration.

"Office" has been defined to mean public employment, and

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its legal meaning to be, an employment on behalf of government in any station of public trust; a place of trust, by virtue of which a person becomes charged with the performance of certain public duties. 5 Wait's Actions and Defenses, p. 1, *et seq.*, and authorities cited. With this definition of the words "eligible" and "office," the constitutional provision may be read as follows: No person elected to any judicial office shall, during the term for which he shall have been elected, be legally qualified to be employed on behalf of government in any station of public trust, other than a judicial office. In other words, be legally qualified as an officer, to perform the duties of a public office, other than judicial.

This interpretation disposes of one branch of the case, viz., the alleged ineligibility of appellant on account of his term as justice, which expired on the 29th day of November, 1882, more than eight months before the beginning of the term of office as county treasurer, for which he received a majority of the votes at the November election, in 1882.

When appellant entered upon his term as justice of the peace on the 29th day of November, 1878, he became, during the continuance of that term, disqualified to hold and perform the duties of any public office except a judicial one. But while he could not, during that term, hold or perform the duties of a public office other than judicial, it does not follow that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice. Suppose that the judicial term had ended on the 8th day of November, 1882, or on the 7th day of November, 1882, the day of the general election, could it be said with reason that appellant might not have been voted for, and legally chosen to, the office of county treasurer for a term to begin in August, 1883? If so, then the office of justice of the peace disqualified him for holding and performing the duties of that office, not only during the term for which he was elected a justice of the peace, but for almost two years after the expiration of that term. Such

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a construction would make the Constitution read that no person elected a justice of the peace shall, during the term for which he shall have been elected, be eligible to be voted for, for any office except a judicial one. Such a construction, we think, is not compatible with sound reason nor a proper interpretation of the Constitution.

We are cited by appellee's counsel to a number of authorities, which, they contend, support their interpretation of the constitutional provision. The questions for decision in the case at bar are before this court for the first time, and hence, so far as this court is concerned, we are upon untrodden ground. Isolated expressions are found in some of the earlier cases, but they will be found to be purely *dicta*, so far as they in any way bear upon the questions in this case. They were not necessary to the decision of the questions before the court, and were evidently made without any thought of deciding or intimating a decision of the questions here involved. We notice those cited:

*Waldo v. Wallace*, 12 Ind. 569. Wallace was the mayor of the city of Indianapolis. During the continuance of his term of office as such, he resigned, became a candidate, and received the highest number of votes, for the office of sheriff for Marion county. The question for decision, and the only one decided, was, could he, during such term, hold and discharge the duties of the office of sheriff. It was decided that he could not. Of the correctness of this decision we have no doubt, but this is not the question before us in the case at bar.

*Gulick v. New*, 14 Ind. 93. The facts in this case are the same, substantially, as in the case of *Waldo v. Wallace*, *supra*. In this case, it was decided that Gulick, the competitor of Wallace for the office of sheriff, was entitled to the office because of the ineligibility of Wallace. HANNA, J., used this language: "Wallace, the person shown by the record to have been the competitor of Gulick, was ineligible to the office of sheriff at the date of the election." In construing this lan-

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guage, it must be remembered that Wallace's term of office as mayor had not expired, and would not expire before the beginning of the sheriff's term to which he claimed to have been elected. At the time the proceeding was instituted, the term for which he had been elected mayor had not expired; Wallace had abandoned it by a resignation, and was assuming to act as sheriff. It was not necessary to decide, and the language used shows no attempt to decide, that if Wallace's term as mayor had expired before the beginning of the sheriff's term, he might not have been chosen to, and legally performed the duties of, the latter office. PERKINS, J., in the same case, speaking of the ground upon which the lower court based its rulings, used language similar to that above quoted from HANNA, J. Without disapproving or giving sanction to the position of the lower court, the judge, subsequently speaks of the ineligibility of Wallace at the time he was voted for, for the office of sheriff, and in another portion of the opinion, of his disability to *hold* the office of sheriff. The question, and the only question, before the court for decision, was the right of the minority candidate to the office, Wallace being ineligible to hold it. From the language used by the learned judge in deciding that question, we can not tell what his opinion was upon the question of ineligibility under the Constitution; whether it applies to the right to be voted for, or to the right to hold and discharge the duties of the office. *Howard v. Shoemaker*, 35 Ind. 111.

In May, 1869, one Sparks was elected mayor of Jeffersonville for the term of two years. On the 11th day of January, 1871, before the expiration of the two years, he was elected by the Legislature a director of the Southern prison, and, having qualified, entered upon the discharge of the duties of that office. In May, 1871, he was re-elected mayor, and took upon himself the discharge of the duties of that office. The eligibility of Sparks for the office of prison director was one of the questions before the court. It was decided that he was not eligible. This was manifestly correct under

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former decisions, as the time for which he had been elected mayor had not expired at the time he entered upon the discharge of the duties of director. DOWNEY, C. J., in delivering the opinion, said that Sparks was ineligible to the office of director of the prison during the term for which he was elected mayor in 1869, and consequently ineligible when he was elected by the Legislature in January, 1871. This is not authority in support of appellee's position. It is rather against it. The ineligibility at the time of the election by the Legislature, seems to be made dependent upon the ineligibility to take and hold the office of director.

It will be seen from this brief review of the cases in this court, that each grew out of an attempt to take and hold another office during the term of a judicial office. In this respect, they differ with the one in hearing. The decisions made in the several cases are authority in all cases of similar facts, but are not applicable to a case like this, so dissimilar in facts.

We are also referred by counsel for appellee to the following cases:

*Searcy v. Grow*, 15 Cal. 117. Grow was returned as elected to the office of sheriff. His right to hold that office was contested on the ground that at the time of his election he was postmaster. He had resigned that office at the time of his qualification as sheriff. The section of the Constitution upon which the contest was based is as follows: "No person holding any lucrative office under the United States or any other power, shall be eligible to any civil office of profit under the State," etc. The court decided that the word "eligible," as used in the above constitutional provision, is an inhibition upon being chosen, and that Grow could not hold the office of sheriff, although he had resigned the Federal office.

*State, ex rel., v. Clarke*, 3 Nevada, 566. This case arose under a constitutional provision similar to that in the Constitution of California, above set out. The case in its facts is similar to the case in 15 Cal., *supra*. The decision

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of the court is also similar. It was held that, while the purpose of the provision in the Constitution is to prevent the holding of a State and Federal office at the same time, in order to carry out the intent of the convention that formed the Constitution, the word "eligible" should be given a more extended signification than is generally given to it, and should be held to mean incapable of being chosen, and incapable of holding. The judge, in delivering the opinion, uses substantially the following language: The etymology of the word, and the meaning generally given to it by the best English authors, would hardly justify this interpretation; but the word, as used in various constitutions, seems to justify this broader and more comprehensive interpretation. These cases are in point in support of appellee's position, that the word "eligible" has reference to the capability of being chosen. But we are not satisfied with the conclusions reached in these cases, nor with the reasoning by which they were reached. We think that the view we have adopted is supported by better authority, and the better reason. It has been decided by the Supreme Court of Wisconsin that a person, not an elector of the State, is ineligible to hold a public office therein, although the Constitution and statutes of the States do not expressly so ordain, and that, in the absence of a constitutional or statutory provision on the subject, such ineligibility goes only to the *holding* of the office, and hence, that if an alien, who is not an elector, receives a plurality of votes for an office, he may lawfully hold and exercise the same, if by naturalization his disability is removed before the commencement of the term of office to which he has been elected. *State, ex rel., v. Smith*, 14 Wis. 497; *State, ex rel., v. Murray*, 28 Wis. 96 (35 Am. R. 638); *State v. Trumpf*, 50 Wis. 103. In the case last cited, it appears that one Geilfuss received a majority vote for treasurer of the city of Milwaukee. At the time he was voted for, he was an alien, and hence, under the decision in 14 Wis., *supra*, was ineligible to the office. Before the beginning of the term of office to which he was chosen, he was duly admitted to

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citizenship of the United States, and at the proper time filed his bond, took the required oath and demanded the office. The court held that he was entitled to it, the ineligibility having been removed by naturalization before the beginning of the term. See also *Privett v. Bickford*, 26 Kan. 52 (40 Am. R. 301).

In different provisions of the Federal and State Constitutions, we find various inhibitions and various uses of the word "eligible." In some instances, it is apparent that they relate to the *holding* of office; in others, it is just as apparent that they relate to the right and capacity to be chosen to an office. Thus, in section 2, of article 1, of the Constitution of the United States, it is provided that no person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, *when elected*, be an inhabitant of that State in which he shall be chosen.

It is very plain that, under this provision, the person elected must be an inhabitant of the State when elected. On the other hand, persons have been admitted as members of the House, who were of proper age at the beginning of the term for which they were elected, although they were not of such age when elected. So, too, section 3, of the Fourteenth Amendment to the Federal Constitution, provides that no person shall be a Senator or Representative in Congress who, having previously taken an oath as a member of Congress, etc., to support the Constitution of the United States, shall have engaged in insurrection or rebellion, etc., against the same. But Congress may, by a two-thirds vote, remove such disability. Under this provision, as stated by Judge McCrARY, it has been the constant practice of the Congress of the United States since the Rebellion, to admit persons to seats in that body who were ineligible at the date of the election, but whose disabilities had been subsequently removed. McCrary Elections, section 258.

It may be that these rulings of Congress have not the

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same weight as judicial determinations, but they are entitled to very great respect. Section 7, art. 4, of the Constitution of this State, fixes the qualifications of members of the General Assembly. These qualifications are all, in plain language, made to relate to the election. We call attention to these sections because they show, as we think, that when the intention was to fix qualifications and limitations to the election, it has been plainly stated, and that when such expressions as "eligible to office" are used, they relate to the holding of office.

Section 2, art. 6, of the State Constitution, provides that no person shall be eligible to the office of clerk more than eight years in any period of twelve. Here the phrase "eligible to office" has reference to the qualification to hold the office, and not to the election; hence it has been held that while a person might properly be elected, he could not hold beyond the eight years. *Carson v. McPhetridge*, 15 Ind. 327. And, so, "eligible to any office," as used in the section of the Constitution under consideration in this cause, has reference to the qualification to hold office, and not to the choosing or election to such office.

We conclude therefore, that the term for which appellant was elected a justice of the peace in 1878, having expired on the 29th day of November, 1882, he was and is qualified to hold the office of county treasurer, the term of which commenced on the 15th day of August, 1883, and that, having received a majority of the votes for such office at the general election in 1882, he is entitled to the office.

It is insisted, however, and the court below so decided, that appellant is disqualified for the office of county treasurer because, at the spring election in his township in 1882, he was voted for, and received a majority of the votes for the office of, justice of the peace, the term to begin on the 29th day of November, 1882, although he did not accept the commission, file a bond, take the oath, or in any way accept such office, but declined it. We can not adopt this view, because we do not think it in harmony with a proper interpretation of the

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provision of the constitution, or with the intent of the framers of that instrument and the people in its adoption, and because it leads to a "*reductio ad absurdum*." In the construction of statutes and constitutions, the prime object is to ascertain and carry out the purpose and intent of the authors. To do this, the words used in the instrument should be first considered in their literal and ordinary signification. But, if by giving them such a signification the meaning of the whole instrument is rendered doubtful, or is made to lead to possible injustice and contradictions, or absurd results, the intent as collected from the whole instrument must prevail over the literal import of terms, and control the strict letter of the law or constitution. *State, ex rel., v. Mayor, etc.*, 28 Ind. 248; *Baker v. Kirk*, 33 Ind. 517; *McDonel v. State, post*, p. 320; *Smith Stat.*, section 488; *People, ex rel., v. Potter*, 47 N. Y. 375, and authorities cited. As we have seen, the provision of the constitution under consideration provides that "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office," etc.

The language of the section is not, that a party shall be ineligible during the time for which he shall have been elected, but during the *term* for which he shall have been so elected. This, we think, implies that there shall be a term by which the ineligibility shall be measured, and that the term in contemplation begins, and can only begin, with the acceptance of the office by proper qualification. It is contended, on one side, that the purpose of the convention in the adoption of this provision was to insure a stable judiciary; that by thus rendering the judges ineligible, the result is to keep them in their places during the term for which they may have been elected. On the other side, it is insisted that the purpose was to keep the judges of the courts free from political alliances, and prevent them using their positions as a means of acquiring other offices. Judging from the debates, we might conclude that the convention had both objects in view. However that may be,

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the section, without doubt, was meant to apply to judges in office, and not to persons who may be chosen simply, but never qualify or enter upon the discharge of official duties. In order, then, to carry out the purpose and full intent of the section, the word "elected," as used therein, can not be taken in the narrow sense contended for by appellee, but must be construed to include, not only being chosen to, but an acceptance of, the office.

Let us suppose that A. and B. are rival aspirants for an office not judicial. In order to render B. ineligible to that office, and thus dispose of him as such rival, A. procures the voters of B.'s township to vote for him for the office of justice of the peace. Having received a majority of the votes, A. contends that B. is elected to that office, and, without accepting or qualifying, is rendered ineligible to the other for the period of four years. Such a contention on the part of A. would strike the common understanding as entirely untenable and unreasonable. Nor could it make any difference whether such election might be with the knowledge and consent of B. or without his knowledge.

An office is not obtained nor held by contract. *McCrary on Elections*, 216; *Pomeroy Const. Law*, sec. 547. It can not be said, with reason, that such consent to be voted for is, in any sense, an acceptance of the office. Until the consenting party is known to have received a majority vote, there is nothing for him to accept. If being voted for and receiving a majority of the votes is an election, in the sense in which the word "elected" is used in this section of the Constitution, it can make no difference whether such votes are cast with or without the knowledge and consent of the party voted for. To say that if the votes are cast with the knowledge and consent of the party voted for, he is thereby elected, and if, without such knowledge, he is not elected, is to depart from the literal signification of the word "elected," as contended for by appellee. To adopt this view, it would become necessary to construe the word "elected," and make the Con-

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stitution read: No person elected, with his knowledge and consent, to a judicial office shall be eligible, etc. And further, it would impose upon the courts, in every case of contest like this, under this section, the unreasonable and difficult duty of deciding whether or not the party thus elected was voted for, with his knowledge and consent. Other questions are argued by counsel, but it will not be necessary for us to consider them.

Without further extending this opinion, we hold that appellant was eligible to the office of county treasurer to which he was chosen, is entitled to it, and that the court below erred in its conclusions of law. The judgment of the trial court is therefore in all things reversed, at the costs of appellee, and the cause remanded, with instructions to that court to make its conclusions of law, and render judgment in accordance with this opinion.

HAMMOND, J., was absent during the consideration of this cause.

#### DISSENTING OPINION.

ELLIOTT, J.—In my judgment our own cases have given a construction to section 16, of article 7, of our Constitution, and their interpretation is, as I think, correct in principle and sustained by authority.

There are points decided in *Waldo v. Wallace*, 12 Ind. 569, and *Gulick v. New*, 14 Ind. 93, to which I yield assent only upon the rule of *stare decisis*. These cases, however, have not only been again and again approved, but the prevailing opinion in the present case also recognizes them as correct expressions of the law, and as this is done they ought, I deferentially submit, be taken in their full force and not stripped of their only support. The central position in these cases is that the term "eligible" refers to the time of the election; this proposition is assumed, and upon it the cases are built. It is logically inconceivable that electors should be required to take notice of ineligibility at any other time than that at which they cast their votes. It is impossible to make anything else of these decisions than a bundle of inconsistencies upon any other

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basis; without it the reasoning is foundationless. The whole theory of the decisions, the entire framework of the opinions, and the language of the writers, refer to the time the electors cast their ballots. It is then that the candidate must be eligible; it is then that he must have capacity to receive the suffrage of the voters. Subsequent cases unhesitatingly give this effect to these decisions. In *Carson v. McPhetridge*, 15 Ind. 327, it was said: "The term eligible, as used in our Constitution, relates to capacity of holding, as well as the capacity of being elected." Can anything be clearer than that this means that the person voted for must be eligible when elected as well as eligible to hold after he is chosen? In *Jeffries v. Rowe*, 63 Ind. 592, the court thus expressed its view: "The term eligible means, not only eligible to be elected to the office, but also eligible to hold it after the election." The decision in *Howard v. Shoemaker*, 35 Ind. 111, turns upon the meaning of the constitutional provisions under discussion, and it was held that eligible means eligible at the time of the election. The language in which the controlling and pivotal proposition of the case is stated is this: "The mayor of a city is a judicial officer within the meaning and intent of sec. 16, art. 7, of the constitution of the State, and that, therefore, Sparks was ineligible to the office of director of the prison during the term for which he was elected mayor in 1869, and consequently ineligible when he was elected by the Legislature in January, 1871." In *Reynolds v. State, ex rel.*, 61 Ind. 392, the court held that an information filed in proceedings in the nature of a *quo warranto* by one claiming an office, was bad, because, to borrow the language of the opinion, "it did not contain any averment, either that the relator was eligible, or of the facts which would have shown that he was eligible, *at the date of said election.*" In the recent case of *State, ex rel., v. Bieler*, 87 Ind. 320, the case cited is expressly approved. Bouvier, Abbott and Lawson adopt the definition of the word given by our cases, and say that it means capacity to be elected as well as to hold. In the case of *Searcy v. Grow*, 15 Cal. 721, it is said: "We un-

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derstand the word eligible to mean capable of being chosen—the subject of selection or choice.” A forcible illustration is given in the opinion in that case, which I borrow: “Suppose a man, when elected, under sentence and conviction for crime—if such a case can be supposed—would a pardon before qualification give him a right to hold the office?” In the case of *State v. Clarke*, 3 Nevada, 566, the decision is that a person ineligible at the time of the election can not be legally elected although before the time comes for him to take the office he becomes eligible. In the cases of *Miller v. Board, etc.*, 25 Cal. 93, and *People v. Sanderson*, 30 Cal. 160, and *Searcy v. Grow*, *supra*, the same point is decided. The case of the *Parker v. Smith*, 3 Minn. 240, also holds that where one is required to be eligible to hold office, the eligibility should be consummate at the time of his election. I think that *State, ex rel., v. Murray*, 28 Wis. 96, will, when carefully studied, be found to be not hostile to the position here taken. In that case, it was admitted that “The term ‘ineligible’ means as well disqualification to hold an office, as disqualification to be elected to an office;” and it was said that the question was not affected by any constitutional or statutory provision. The real point decided was, that the general rule does not apply in cases where the disqualification is one which the person may remove by his own act. I quote from the opinion: “In my judgment it is not that a person who is not an elector only because of some disqualification which he has the power to remove at any time, is thereby rendered ineligible *to be elected* to a public office for a term which is to commence at a future time.” It is obvious that the decision does not apply here, because we have a constitutional prohibition, and because the disqualification is one which the person can not remove. A constitutional barrier can not be thrown down. What is said of the case just cited is true of the Kansas case built upon it. In *State, ex rel., v. Smith*, 14 Wis. 497, Chief Justice DIXON, speaking for the court, said that there were two questions in the case, and thus stated the first: “1st. Whether the defend-

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ant, being an alien and not a qualified elector at the time of his election, was eligible to the office," and assumes in the entire argument that the eligibility refers to the time of the election. In a work of recognized worth it is said: "If an election is made of a person, who is ineligible, that is, incapable of being elected, the election of such person is absolutely void." Cush. Parl. Law, section 175. This author recognizes the difference between disabilities which may be removed by the act of the party, and those which the person can not divest himself of, and says that the latter prevents a valid election. He also says, "where the following terms are used, namely,—'shall be incapable of being elected;','shall be eligible to a seat;','shall be eligible as a candidate for;','shall be ineligible;' the disqualification relates to the time of election." Cush. Parl. Law, sec. 78.

It is, as I read the decisions, a mistake to suppose that the cases of *Gulick v. New*, *supra*, *Waldo v. Wallace*, *supra*, *Carson v. McPhetridge*, *supra*, and *Howard v. Shoemaker*, *supra*, do not give meaning and effect to the constitutional provisions here under consideration. The vital question in these cases was the construction of that provision. It was the important, the controlling question; without a decision of it no conclusion was logically possible. Upon it the cases turned. The whole provision was the subject of discussion. The questions in those cases were not as to mere individual rights, nor were they confined to mere isolated and collateral questions of individual eligibility—not these by any means—but the question which controlled the decisions and gave them tone and character was as to the force and meaning of this provision of our organic law. I see not how the conclusion can be escaped, that the question as to the meaning of this provision has been forever set at rest by judicial decisions.

It seems to me that the question has not only been decided, but that it has been correctly decided. The purpose of the framers of the Constitution was to prevent one chosen to a judicial office from going before the people for any other

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than a judicial office. This was the view of this court in the first case which came before it, involving a discussion of the constitutional provision. It was said in that case of the person who received the highest number of votes for the office of sheriff: "Wallace, having voluntarily accepted a position under that law, was, by that act, and by force of the constitutional prohibition, placed in a condition that his mind was left free to discharge judicial functions, for the term for which he accepted, without being disturbed by seeking preferment, for the time being, in either of the other departments." This is a clear expression of the views of the court, and it reflects the intention of the framers of the Constitution, for they meant that during the term of the judicial office no disturbance of the judge's mind should be caused by political aspirations or contests. In speaking of a similar provision in the Constitution of California, it was said in *People v. Sanderson*, 30 Cal. 160, that "This provision of the Constitution, so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain." The purpose of the Constitution was to keep judicial officers, during the time they are serving as such, from becoming candidates for office, and the mischief intended to be prevented is that of a judge, holding in his hands personal interests and property rights with power to favor attorneys and parties, or to annoy and injure them, from entering a contest where such power might give him undue influence or lead to unjust favoritism and corrupt results. The evil against which the constitutional provision is directed is the entrance into the political contest by one who is at the time a judicial

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officer. The prohibition shuts the judicial officer from the political race. If he be such an officer, he can not be a contestant. In some of the counties of the State, ministerial officers are elected nearly two years before they can be inducted into office (this has occurred because of changes in the statutes and by amendment to the Constitution changing the time of elections), and if the construction of the Constitution for which I am contending be not correct, then a judge may be a candidate, may be elected and yet serve as judge for two years, or until the time the ministerial office is entered into, and surely the Constitution never meant to permit such a result. But take the ordinary case, officers are elected in November; they usually become contestants weeks before, sometimes months, and not unfrequently years before the election, and if a judge becomes a competitor for the office, he is during all this period engaged in a political strife, the very thing the Constitution intended to prevent. The only way to avoid such a result is to give effect to the plain language of the Constitution and hold that a judge can not be a competitor in a strife for political preferment, but that while he is a judge he must "beware of an entrance" into a political contest. This is the result the Constitution was intended to accomplish, and the purpose is a wise one, for judges ought not to be allowed to be scramblers for political places. The judge must wait until his term of office expires before he can enter the strife for political office, and as long as he is barred from entering into a contest, he is not eligible.

In this case, the appellant was still in office by virtue of a prior election and qualification, and was also an officer elect, having been, at his own will, chosen his own successor. I can not escape the conclusion that having been elected at his request, whether express or implied is not material, he became ineligible to election to a ministerial office. It can not be doubted that when it is said of one that he is elected to an office, it is ordinarily meant that he has been chosen or selected. It is never meant, I think it not too much to say,

that he has been chosen and has also been inducted into office, or has qualified by giving bond and taking an official oath. All will agree, I dare say, that as to the public, the candidate who has been legally chosen is elected when so declared by the proper authorities. As to the public then, the question is without difficulty, for the candidate declared chosen is elected.

A citizen, however, has individual rights, and it would result in injury and lead to injustice to declare that whenever he is chosen to the office of justice of the peace, or any other judicial office, he can seek no political preferment, even though he may have been chosen against his will. A construction of the Constitution that would result in making a man a judicial officer against his will would put it in the power of those desiring to obstruct his way to other offices to disfranchise him, and this the Constitution never intended should occur. We can not, therefore, I agree, hold that a man selected or chosen against his will or consent is, so far as concerns his own rights, elected within the meaning of the Constitution, however it may be as to the public.

I agree, too, that there must be some acceptance on his part. Here comes the point of divergence upon this branch of the case. The majority of the court think that acceptance can only come after election and by qualification, and I, that it may come before as well as after, and that election and qualification are essentially distinct and different things. To my mind it is clear that consent or acceptance may be given as effectually before as after election; that an acceptance is acceptance whensoever made.

I can not see that it is any more difficult to prove acceptance before an election than it is to prove it afterwards. In any event, it is a question of fact to be determined, like all other questions of fact, upon evidence. If it leads to a *reductio ad absurdum* in the one case, to hold consent essential, it no less does so in the other. It seems to me that it is much more unreasonable to permit a man to cast aside an office which he has sought, after he has secured the votes

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of the electors, by his own efforts, than to hold that when he has done this he must abide the consequences of his own voluntary act. If men are not held to keep what they have sought and obtained, they are at unrestrained liberty to lightly toss about offices conferred upon them at their own solicitation.

If the view which I take adds, which I deny, a provision to the Constitution, so, I say with deference, does that of the majority, for it in effect adds the provision "and qualified." If for this reason one theory is erroneous, so also is the other, for the one adds the element of qualification, which the Constitution itself makes a distinct and different thing.

We add nothing to the Constitution in either case. If my view is adopted, then we say the provision does not apply to an individual who has not assented to his selection; if the view of the majority is adopted, then we say that it does not apply to one who has not consented and evidenced his consent by qualifying. In neither case is there addition or subtraction; simply and only a denial of applicability to an individual who has not assented. This objection lies not against either theory, but if in this I am in error, then, surely, I am not when I affirm that if it lies against one, so it does against both, and this would drive us to stand on the bare words of the Constitution, and to hold it applicable whether there was or was not assent before or after the election.

Acceptance is the vital element; without it the candidate voted for and chosen is not within the purview of the constitutional provision. But whether this acceptance precedes or follows the election is not material. Assent on the part of the individual brings him within the prohibition, gives it applicability to him. This, I understand, we all affirm, but the majority think that the only evidence of binding assent is the qualification, for it is said that "the term in contemplation begins with the acceptance of the office by proper qualification." I heartily agree that the term contemplated is that to which the person is chosen with his assent, but can not

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think that assent implies or requires qualification ; I believe that election precedes qualification.

Our statutes make a clear and broad distinction between election and qualification. Our Constitution does so in no uncertain terms. It declares that "Every person elected or appointed to any office under this Constitution shall, before entering on the duties thereof, take an oath or affirmation to support the Constitution of this State and of the United States, and also an oath of office." Is it not clear from this that election precedes qualification, that before a man can qualify he must be elected? It is manifest that election and qualification are as distinct as things pertaining to one general subject can possibly be. If, then, one must be elected before he can qualify, can it be logically conceivable that in order to make it appear that he was elected within the meaning of the Constitution it must be shown that he qualified? To hold this is to reverse the order of things established by our organic law, our statutes, and our decisions.

Our Legislatures, through a long series of years, have used the word "elected" in a uniform sense, and have never, so far as I can find after a somewhat careful search, used it as meaning selection and qualification. Thus, in the section of the statute prescribing the duties of the board of canvassers, it is declared that "Such board shall declare the person having the highest number of votes given for any office to be filled by the voters of a single county duly elected to such office." R. S. 1881, sec. 4718. In another section it is written: "Where any person is elected to an office," not commissioned by the Governor, the clerk shall issue a certificate of election. But further quotations are unnecessary, for all statutory provisions make like use of the word.

Sedulous care has been taken by the framers of our Constitution and laws to confine the word "elected" to its popular and legal signification, and to contradistinguish the term "elected" from the term "qualified." Especially is this apparent, where the purpose has been to prevent a vacancy in

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office. In all such cases there is a careful conjunction of the terms "elected" and "qualified." Courts have with equal care marked this distinction. It is the rule that if one is elected to office and dies before qualification, there is a holding over, but if he dies after election and qualification, there is no holding over, but a vacancy. *People v. Lord*, 9 Mich. 227; *State, ex rel., v. Seay*, 64 Mo. 89 (27 Am. R. 206). Many cases might be cited to show that the courts never use the word "elected" as including "qualified." *Clarke v. Irwin*, 5 Nev. 111; *State, ex rel., v. Tucker*, 54 Ala. 205; *Magruder v. Swann*, 25 Md. 173. It would ruffle the current of judicial opinion, do violence to language, and throw into hopeless confusion our constitutional and statutory law, to hold that one can not be deemed elected until he has qualified. No such result will follow by holding that as to the public the candidate chosen is elected, and as to the individual chosen that if he assented, before or after election, he is within the Constitution and bound by its terms.

The conclusion for which I contend is the only one which will effect the purpose of the makers of the Constitution. They never meant that one chosen to a judicial office should wait until the time for the induction into place arrived before it could be said that he was elected. They never meant that one chosen might, during the time intervening between his selection and induction or qualification, become a candidate for a ministerial office. They never meant that one so chosen should in this interim play fast and loose; nor did they mean that one so chosen might have it in his own power to make the provision apply or not as he himself willed. If qualification is necessary to make the constitutional provision apply, then there is an interim in all cases of a considerable period of time, in others of a long time—long, at all events, as contrasted with the term of office, after the result of the election is declared before the candidate is elected. In some of the circuits, judges were elected in 1882, but their terms can not begin until November, 1884. In such a case can the judge elect, by delaying to qualify until October, 1884, make an interim of

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twenty-three months, in which he can not be said to be elected, although at his own solicitation the majority cast their votes for him? If we say that the meaning of elected "is elected and qualified," we have this remarkable result; but if it be held that assent perfects the choice, then this result with all its evil consequences is avoided, for there is then no interim. Suppose—and I do no more than assume what in the main is a real case—assume, I say, that A. was elected judge in November, 1882; that the term does not begin until November, 1884; suppose further that he becomes a candidate for some profitable ministerial office; that for this he is defeated; that then he falls back upon his first election and qualifies for and claims the judicial office held in abeyance. If he be not elected until qualified there is no way to prevent this, and the judge elect is at liberty to take or reject the judicial office, and to use the position given by his selection for selfish purposes. The evil of permitting one elected to a judicial office to hold it in suspension is even greater than that of allowing one actually in office to seek political preferment, for it gives him a position of vantage equally as great because it enables him to use his place as an officer elect to unduly influence voters. It tends to degrade the judicial office, for it suffers it to become a thing to be tossed about at the will of an unworthy man. It either leaves unfilled the office which the voters had done all they could to fill, or else leaves one there whose only claim is that a successor has not been elected and qualified. These are results to be deplored, and which the Constitution intended to prevent. If it be held that a man who has sought the office is elected when the voters give him their suffrages this is prevented, and no wrong is done the public, and surely none to the man who freely sought or accepted what was put before him. If he be held to keep what he sought, he has no reason to complain, but if he be allowed to toss it about at will, the voters have just reason for complaint.

I concur in the conclusion reached by the trial court upon this question, and am for affirming the judgment.

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No. 9453.

## ADAMS v. KENNEDY.

INSTRUCTION.—*Evidence.—Question for Jury.—Error.*—Where, on the trial of a civil action, the plaintiff introduces evidence tending to sustain the material allegations of his complaint, it is error for the court to invade the province of the jury and instruct them to return a verdict for the defendant.

From the Hendricks Circuit Court.

*C. C. Nave*, for appellant.

*L. M. Campbell*, for appellee.

Howk, J.—The appellant sued the appellee in a complaint of one paragraph, wherein he alleged in substance that on the 15th day of November, 1871, he was a minor, aged thirteen years, and then unfortunately and accidentally had both bones of his left leg broken, just above the ankle; that his employer called on the appellee, who was then and there a practicing physician and surgeon, and another physician and surgeon who had since died, to attend to, treat and adjust the broken bones of appellant's leg; that the appellee, as such physician and surgeon, then and there undertook the treatment and care of the appellant, and then and there proceeded and attempted to set and adjust the broken bones of the appellant's left leg, but that the appellee so negligently, unskilfully and wrongfully set and adjusted the broken bones of appellant's leg as to leave the same in a dangerous and crooked shape and condition; that when the appellee was informed that the broken bones were not properly set and adjusted, but were in a crooked condition, he refused and neglected to set and adjust the appellant's broken leg, and to attend on him in a proper and skilful manner, and thereby the appellant was confined to his bed for months thereafter; that, owing to the careless and unskilful acts of appellee in the premises, the appellant's left leg had been and then was, without the appellant's fault, crooked and not in a proper and healthy condition,

90	318
128	85
90	318
131	257

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whereby appellant had sustained damages in the sum of \$6,000. Wherefore, etc.

The cause was put at issue and submitted to a jury for trial, and, under the instructions of the court, a verdict was returned for the appellee, the defendant below. Over the appellant's motion for a new trial and his exception saved, the court rendered judgment against him for the appellee's costs.

Error is assigned here by the appellant upon the overruling of his motion for a new trial. In this motion the first cause assigned for such new trial was in substance as follows: That the court erred in giving to the jury, of its own motion (over the objection of the plaintiff), the following instruction:

"The plaintiff has failed by the evidence given by him in this cause to make out a case against the defendant, and therefore the jury will return a verdict in favor of the defendant and against the plaintiff, without retiring from the jury-box."

There are cases in which the court may very properly instruct the jury to return a verdict for the one party or the other, without usurping or invading the province of the jury, and simply in the discharge of the court's own duty. *Dodge v. Gaylord*, 53 Ind. 365; *Moss v. Witness Printing Co.*, 64 Ind. 125; *American Ins. Co. v. Butler*, 70 Ind. 1. It is insisted, however, by the appellant's counsel, that in this case the court did invade the province of the jury, and by its instruction assumed to decide the questions of fact which the parties had submitted to the jury for decision. In such a case, if there is evidence introduced which tends to sustain the material allegations of the complaint, its sufficiency or insufficiency is a question for the decision of the jury, and it is error for the court, by its instructions, to control or direct the verdict. The evidence is in the record, and it is of such a character that if the jury had returned a verdict thereon for the appellant, this court could not, under its well settled rules,

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have disturbed the verdict on the weight or for the want of evidence. From our reading of the evidence, as it appears in the record, it fairly tends, we think, to sustain the material allegations of the appellant's complaint. We are of the opinion, therefore, that the case is one in which the appellant had a clear and undoubted right to a trial by jury and to a verdict, wholly uninfluenced by any opinion of the court in relation to the evidence. The court invaded the province of the jury in the instruction complained of, and as applied to this case it was clearly erroneous.

For this error of law, we think, the motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial and for further proceedings.

No. 11,190.

## MCDONEL v. THE STATE.

**PRACTICE.—Production of Articles Used as Evidence.**—A motion, based on matters not within judicial knowledge, for the production of certain named articles in open court for inspection, should be supported by affidavit showing the facts and some reason for invoking the action of the court.

**JUROR.—Competency of.—Alien.—Statute Construed.**—The statute, R. S. 1881, section 1793, which makes alienage a cause of challenge of a juror, requires only that he be a citizen of this State, and not that he shall be a citizen of the United States.

**WITNESS.—Impeachment of.—Evidence.**—Where a witness testifies in his examination in chief that the reputation of a party is good with respect to some quality or disposition, it is competent to show by cross-examination that he has heard reports at variance with the reputation he has given the party. *Oliver v. Pate*, 43 Ind. 132, distinguished.

**CRIMINAL LAW.—Evidence.**—A denial by one accused of crime, of a fact which tends to show guilt, is itself a criminating circumstance, and proper evidence against him.

**SAME.—Inspection of Weapons by Juror.**—It is entirely proper, as part of the *res gestæ*, to allow the jury to inspect a weapon by which an offence is alleged to have been committed.

90	380
194	17
90	380
132	543
90	320
135	258
90	320
164	274

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PRACTICE.—*Witness.—Misconduct of Counsel.*—Persistence of counsel in putting proper questions to a witness, which the court erroneously refused to allow, is not subject to criticism in the Supreme Court.

From the Criminal Court of Allen County.

*S. E. Sinclair, H. C. Hanna, H. Colerick and W. S. Oppenheim*, for appellant.

*F. T. Hord*, Attorney General, *C. M. Dawson*, Prosecuting Attorney, and *W. G. Colerick*, for the State.

HAMMOND, J.—Indictment charging the appellant with murder in the first degree. A trial by jury resulted in conviction, fixing the death penalty as the punishment. Over appellant's motion for a new trial, and exception to the ruling, judgment was pronounced upon the verdict.

The record properly presents many questions as to the rulings of the trial court, but, regarding all others as waived, we will consider such only as appellant's counsel have discussed in this court:

1. The indictment was returned April 7th, 1883, and the trial began on the 7th of the following month. Three days after the return of the indictment the appellant moved the court in writing for an order to require the prosecuting attorney to produce in open court, for the inspection and examination of appellant's counsel, certain named articles, alleged in the motion to be in the possession of the prosecuting attorney, and to have been introduced in evidence by the State at the examination before the justice of the peace; and asking, upon the production of the same, that they should be placed in the custody of an officer of the court, for the inspection of either party in the presence of such officer. The motion was overruled. The ruling was correct. No affidavit accompanied the motion. The court could not take judicial notice that the articles referred to were in the custody of the State's attorney, nor that they had been introduced in evidence before the justice at the preliminary examination, nor that

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their production for the inspection of appellant's counsel was necessary or material for his defence. Analogous motions in civil cases are expressly required by statute to be supported by affidavit. Section 480, R. S. 1881. Good practice in all cases requires that where a motion is founded upon matters not within the judicial knowledge of the court, there should be an affidavit as to the existence of the facts upon which it is based, showing their materiality and the necessity for invoking the aid of the court with reference thereto.

2. In empanelling the jury to try the case, one Henry Bushing was called as a juror. He stated under oath, as to his competency, that he was a voter, and a freeholder and householder, in the city of Fort Wayne; that he had not formed or expressed any opinion as to the guilt or innocence of the accused; that he was born in Germany; was thirty-three years of age; that his parents lived in Germany; that he had resided in the United States and in this State seventeen years; that he had, at the clerk's office, in the courthouse, in Fort Wayne, six years after coming to this country, taken out his first, but had never taken out his second, naturalization papers; and that he had been voting for the past ten years. The appellant objected to the juror, on the ground that he was an alien, but his objection was overruled by the court, and to this ruling he excepted. On his peremptory challenge, Bushing was then excused from the jury, and another was called and accepted in his place. The peremptory challenge which excused Bushing was the thirteenth and last peremptory challenge exercised by the appellant. It is claimed that the challenge for cause should have been allowed, and that its refusal by the court was error, for which appellant was entitled to a new trial.

Section 1793, R. S. 1881, provides that "The following, and no other, shall be good causes for challenge to any person called as a juror in any criminal trial: \* \* \* \*

"*Ninth.* That he is an alien."

The evidence of Bushing on his *voire dire* showed that al-

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though he was not a citizen of the United States, he was a citizen and a voter of the State, under section 2 of art. 2 (section 84, R. S. 1881) of our State Constitution. One may be a citizen of a State and yet not a citizen of the United States. *Thomasson v. State*, 15 Ind. 449; *Cory v. Carter*, 48 Ind. 327 (17 Am. R. 738); *McCarthy v. Froelke*, 63 Ind. 507; *In Re Wehlitz*, 16 Wis. 443.

It is proper, therefore, to consider whether the ninth cause for challenge of a person, called as a juror, in section 1793, *supra*, relates to one who is not a citizen of the United States, or merely to one who is not a citizen of this State. It must be conceded that the word "alien" almost uniformly applies to one born beyond the jurisdiction of the United States, and not naturalized conformably to the laws of the United States. It is not improbable, however, that this general use of the word obtains from the fact that in most of the States of the Union persons who are not citizens of the United States are not admitted to State citizenship. In this State, however, a declaration of intention to become citizens of the United States, with the requisite residence in this State, not only confers upon male persons of foreign birth the elective franchise, but renders them eligible to any office in the State, except Governor, Lieutenant Governor, Senator and Representative in the Legislature. Sections 103 and 133, R. S. 1881; *McCarthy v. Froelke*, *supra*.

Mr. Proffatt, in his treatise on trial by jury, section 116, says: "It is necessary that a juror should be a citizen of the State, a qualified elector, and that he has not forfeited any of his political rights by a conviction for crime. Alienage, therefore, is good ground for the exclusion of a person from a jury." The word "alienage" seems to be used by the author with reference to one who is not a citizen of the State. By section 1386, R. S. 1881, the jury commissioners, in selecting jurors, are directed to take their names from those on the tax-duplicate, who are legal voters and citizens of the United States; "and they shall not select the name of any

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person who is not a voter of the county, or who is not either a freeholder or householder" of the county. The wording of the section warrants the construction that the part relating to citizens of the United States is simply directory, while that respecting legal voters and householders or freeholders is mandatory. Section 1393, R. S. 1881, defining the qualifications of a juror, is as follows: "To be qualified as a juror, a person must be a resident voter of the county and a freeholder or householder." It will be seen that the definition does not require the juror to be a citizen of the United States. We are of the opinion that the ninth cause for challenge in section 1793, *supra*, has reference to the qualification of a juror as defined in section 1393, *supra*, or, in other words, that the term "alien," as used in the statute, relates to one who is not a citizen, nor a voter of the State.

This construction is in harmony with the spirit and policy of our Constitution and laws respecting citizens of the State of foreign birth, who may not be citizens of the United States. For it would seem incompatible with the spirit of our laws to exclude one from the jury-box who was eligible to act as jury commissioner in selecting jurors; or as sheriff in empanelling a jury; or as judge to preside at the trial. The construction we give the statute avoids this inconsistency, and we think should be adopted. We must, therefore, hold that there was no error in refusing the appellant's challenge to Bushing on the ground of alienage.

3. There was evidence at the trial tending to show that the motive for the homicide was to obtain money belonging to the deceased.

Louise Cavalier, a witness for appellant, testified that at the time of the commission of the crime she was acquainted with his general reputation for humanity and honesty in the neighborhood where he resided, and that such reputation was good. She was cross-examined by counsel for the State, and asked a series of questions as to whether she had heard certain rumors, specifically named, which, had she admitted hearing

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them, would have materially weakened the force of her evidence in chief as to appellant's reputation. To each of the questions thus asked her on cross-examination the court sustained the appellant's objection; but he complained and objected to the persistence of counsel for the State in asking what he claims were improper questions. It is urged that the course of counsel for the State in this respect prejudiced the rights of the accused by making on the minds of the jury the impression that he had been guilty of the offences about the rumors of which the questions were asked. Had the questions, numerous as they were, been wholly irrelevant, we are not prepared to say that the conduct of the State's counsel would not have been open to criticism; but we are clearly of the opinion that the questions asked the witness on cross-examination were proper, and that the court erred against the State in sustaining appellant's objections thereto. The questions were relevant, not to prove that the appellant had been guilty of the offences referred to in the questions, but to elicit testimony which might affect the credibility of the witness's evidence in chief as to the appellant's reputation for humanity and honesty. One's reputation consists in the general estimation in which he is held by his neighbors. This is to be ascertained from what they generally say of him. When a witness testifies that such reputation is good with respect to some quality or disposition, it is competent to show by his cross-examination that he has heard reports at variance with the reputation he has given the party; and if his admissions of hearing such adverse rumors go to the extent of showing that they were general in the neighborhood where the party resided, the effect of the witness's testimony in chief would be destroyed. *Wills Cir. Ev. 165-6. Oliver v. Pate, 43 Ind. 132*, cited by appellant's counsel, is not in conflict with this view. There the questions asked the witnesses on cross-examination were as to what they had heard the neighbors say as to the honesty of a party whose reputation for truth and veracity they had testified was good. The questions asked on

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cross-examination in that case were properly held to be impertinent to the matter testified to by the witnesses in their examination in chief.

4. The State introduced as a witness one Arthur Dodge. He testified that he went to the jail where appellant was confined, with a certain gun and pawn ticket, and asked the appellant in the presence of one Erastus Shuman, if he knew the gun, and if he had signed the ticket, and that the appellant denied knowing the gun, and also denied signing the ticket. Witness testified that he then asked Shuman, in appellant's presence, if appellant signed that ticket; that Shuman replied that he did; and that appellant then said that he did not sign it, and also said that he had never seen the gun or the ticket.

The gun was identified by other witnesses as having been the property of the deceased at the time of the homicide, which occurred on March 23d, 1883. Shuman testified that he was a pawnbroker in Fort Wayne; that on March 28th, 1883, which was before the discovery of the crime, the appellant brought this gun to the witness's place of business and pawned it to him for \$10, signing two pawn tickets, one of which the witness retained, giving the other to the appellant. Other evidence showed that the pawn ticket, which Shuman identified as the one he gave appellant, was found concealed at a place where the appellant had been seen to go. The conversation at the jail about a pawn ticket related to the one given by Shuman to the appellant. It is earnestly insisted that the conversation testified to by Dodge was improperly admitted. We are of a contrary opinion. If the jury believed from the evidence that the gun belonged to the deceased, and that it was pawned by the appellant as Sherman testified, the appellant's denial of ever having seen the gun, or of having signed the pawn ticket, was a circumstance proper for the jury to consider, with other circumstances, in determining his guilt. Where one charged with a crime denies, or gives a false account of a circumstance or suspicious

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fact, tending to connect him with the offence, such denial may be regarded as a criminal circumstance proper to go to the jury. Whart. Crim. Ev., section 761. There was no error in admitting the testimony objected to.

5. The evidence showed quite conclusively that the mortal wound was inflicted with a hatchet, identified by the evidence as found in the cabin where the body of the deceased was discovered several days after his death. After it was thus identified at the trial, one of the counsel for the State said: "We desire that the jury inspect this hatchet," at the same time placing it in the hands of one of the jurors. It was immediately taken from the juror by order of the court. The conduct of counsel for the State, in this matter, was objected to by appellant's counsel. Thereupon the court said to the jury: "I do not think that these articles can be given to the jury. The fact that the juror had placed in his hand what was alleged to be the hatchet with which the fatal blow was given, you, Gentlemen of the Jury, will not consider that in evidence, or as any part of the evidence, and you are not to take into consideration the marks, if any, that you saw upon it, nor consider that as evidence when you retire to make up your verdict in this case, and you must not speak of it, or refer to it in the jury room, as it is not evidence."

Had the conduct of counsel, in handing the hatchet to the juror, been as flagrant a breach of propriety as it is claimed to have been, we would still, in view of the court's prompt and broad admonition to the jury, think such conduct was rendered harmless in its effect. Jurors are presumed to be men of conscience and intelligence, honestly striving to do impartial justice. Where, in the course of a trial, there occurs an irregularity, such as that under consideration is claimed to have been, but is promptly and fully disapproved by the court in an instruction to the jury, it can not be presumed that the jury will disregard the court's caution and allow the misconduct to bias their minds. Our opinion is, however, that the State had a right to have the hatchet inspected

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by the jury. It is well settled that all instruments by which an offence is alleged to have been committed may be inspected by the jury. All clothing of the parties concerned and all materials in any way forming part of the *res gestæ*, from which inferences of guilt or innocence may be drawn, are proper to be produced at the trial for the inspection of the jury. *Com. v. Brown*, 121 Mass. 69; *People v. Gonzalez*, 35 N. Y. 49; *Gardiner v. People*, 6 Parker C. C. 155; *State v. Mordecai*, 68 N. C. 207; *State v. Graham*, 74 N. C. 646.

There was no error respecting the inspection of the hatchet by the jury, of which the appellant can complain.

6. The appellant's counsel insist that the seventeenth instruction given by the court on its own motion does not state the law correctly upon the subject of malice. The instruction is as follows:

"17. Malice, within the meaning of the law, includes not only hatred and revenge, but every other unlawful and unjustifiable act. Malice is not confined to ill-will towards an individual, but it is intended to denote an action flowing from any wicked and corrupt motive; a thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief."

The fault of the above charge, if any, was rather in favor of the appellant. Its definition of malice seems to exclude its existence unless there be hatred and revenge connected with the doing of every unlawful and unjustifiable act. It is not open to the objection urged by appellant's counsel, that it informed the jury that the doing of any unlawful or unjustifiable act would, of itself, denote malice. The instructions, taken altogether, were quite as favorable to the appellant as he could have expected.

7. Finally, it is urged that the verdict of the jury is not sustained by the evidence. We have examined the evidence carefully. It is circumstantial, but the circumstances are so clearly proved, and point so conclusively to the guilt of the

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appellant, that there appears to be no ground for reasonable doubt. We think that the jury, in finding the appellant guilty, as charged in the indictment, reached a correct conclusion.

We have thus, deeply impressed with the importance and magnitude of the case, involving, as it does, the life of a human being, given each question presented our best consideration. Our acknowledgments are due to counsel, both for the appellant and for the State, for their able briefs and oral arguments, which have been of great assistance in our labor.

The record does not disclose any error prejudicial to the legal rights of the appellant.

Judgment affirmed.

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No. 10,376.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. ROUNTREE.

*PRACTICE.—Issue and Trial.—Withdrawal of Appearance and Answer.—Motion to Set Aside Default.—Error.*—There is no error in overruling a motion to set aside a default, when the record shows there was no default, but that after issue joined and trial had, and before the announcement of the finding, the defendant's counsel merely withdrew their appearance and the answer to the complaint.

From the Montgomery Circuit Court.

*A. D. Thomas*, for appellant.

*R. B. F. Peirce, G. W. Hurley and B. Crane*, for appellee.

HOWK, J.—Upon the record of this cause the appellant, the defendant below, has assigned as errors the following decisions of the circuit court:

1. In overruling its motion to set aside the default and judgment in this cause;

2. In overruling its motion for a new trial of such motion.

Appellee's counsel insist, in argument, that the judgment in this case was rendered against the appellant, not upon its

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default, but, upon a trial of the cause by the court by the consent of the parties, the coming of a jury being waived, and upon the finding of the court for the appellee. Counsel claim, therefore, that appellant's only remedy was a motion for a new trial, and that it can not treat the trial had with its consent as no trial, and ask to have the proceedings and judgment considered as had upon default.

The record shows that the suit was commenced by appellee on the 15th day of February, 1881; that the cause was continued on the 12th day of March, and again on the 25th day of May, 1881; that on the 27th day of September, 1881, the appellant appeared by L. B. Willson, Esq., its attorney, and filed a demurrer to the complaint, which was overruled, and then filed its answer to the complaint; that, on the next day, the appellant filed two affidavits in support of its motion for a continuance of the cause; that, on the next day, the parties appeared, and the court sustained the motion on account of the absence of appellant's witness, J. C. Reeves, whereupon the appellee admitted that the witness Reeves would swear to the statements set out in the affidavit; that thereupon, on the same day, "this cause is, by consent of parties, submitted to the court for trial, and the coming of a jury is waived, and the court having heard the evidence the further consideration of the cause is postponed;" that afterwards, on the 4th day of October, 1881, Messrs. Kennedy and Brush came, and, by leave of the court, withdrew the appellant's answer theretofore filed herein, and withdrew also their appearance for the appellant; and that, on the same day, the court, being sufficiently advised, announced its finding for the appellee, and assessed his damages in the sum of \$800.06, with costs, and rendered judgment accordingly.

The record further shows that four days after the rendition of such judgment the appellant moved the court in writing "to vacate and set aside the default and judgment, heretofore taken in said cause, on the ground of the inadvertence, surprise and excusable neglect of said defendant, and, in sup-

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port of its motion, files affidavits herewith to which it refers, and asks leave of the court to file additional affidavits in support hereof within a reasonable time."

These are the facts of this cause, as shown by the record before us, and, upon this showing, we are of opinion that the point made by appellee's counsel is well taken; that the judgment below was rendered, not upon the default of the appellant, but upon a trial had and finding made by the court, by and with the consent as well of the appellant as of the appellee; and that the appellant could not, after such trial, by the action of its attorneys in withdrawing its answer and their appearance, be heard to claim that the finding and judgment had been made and rendered upon its default, through its inadvertence, surprise and excusable neglect. It seems to us that the appellant has mistaken its remedy, if any it had, in this case. It should have filed its motion for a new trial, assigning as reason therefor the third statutory cause, namely: "Accident or surprise, which ordinary prudence could not have guarded against." Section 559, R. S. 1881. Possibly, the affidavits appearing in the record might have sustained, or tended to sustain, such a cause for a new trial; but, certainly, neither the affidavits nor the record showed, or tended to show, that the judgment below was rendered upon default. It may well have been, therefore, that the court overruled the appellant's motion to set aside the default, upon the ground that its own record conclusively showed that the judgment had not in fact been rendered upon default. In this state of the record, we can not say that the court erred, and, therefore, we are bound to say that it did not err, in overruling appellant's motion to set aside the alleged default. For the legal presumption is, that the court did not err in overruling appellant's motion, and this presumption is not removed or overcome by any matter apparent in the record. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; *Morris v. Stern*, 80 Ind. 227.

The judgment is affirmed, with costs.

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 Holmes *et al.* v. Boyd, Cashier.
 

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No. 8274.

## HOLMES ET AL. v. BOYD, CASHIER.

**MORTGAGE.—Foreclosure.—Parties.—Trust and Trustee.—Endorser and Endorsee.**—Where a note secured by mortgage is purchased by a bank, and endorsed to its cashier, he is trustee of an express trust, and may sue to foreclose in his own name, under the code.

**SAME.—National Banks.—May Purchase Mortgage on Real Estate to Protect Junior Lien.**—A national bank, lawfully holding a mortgage on real estate, may, to protect its interests, purchase a prior mortgage on the same real estate.

**SAME.—Contract.—Promissory Note.—Forbearance to Sue.—Payment of Interest.—Consideration.**—An agreement not to sue upon a promissory note which is due, in consideration of the payment at the end of each year of interest not exceeding the rate provided for by the note, such agreement to pay being made not by the maker of the note but by one who has purchased real estate mortgaged to secure it, is without consideration, and will not bar a suit to foreclose, nor is it admissible in evidence in such suit.

From the Boone Circuit Court.

*P. H. Dutch, — Davidson, — Baker, J. W. Clements, O. P. Mahan, H. N. Spaan and F. Heiner, for appellants.*  
*G. W. Chapman and U. J. Hammond, for appellee.*

**NIBLACK, C. J.**—Action by John M. Boyd, cashier of the First National Bank of Thorntown, for the use and benefit of that bank, against Ira N. Holmes and Amanda D. Holmes, his wife, Patrick H. Dutch and Mary A. Dutch, his wife, and Charles A. Dryer, assignee in bankruptcy of the said Ira N. Holmes, and commenced on the 3d day of December, 1878. The complaint alleged that on the 1st day of January, 1869, the said Ira N. Holmes executed to one Armstrong Ross, his promissory note for \$3,000, payable on or before the 1st day of January, 1870, without relief from valuation laws, and with ten per cent. interest from date; that on the 5th day of January, 1869, the said Holmes and wife, to secure the payment of said note, executed a mortgage on certain described real estate in Boone county, which was duly recorded; that on the 12th day of December, 1877, the

90	330
126	13
90	332
148	115

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said Holmes and wife executed a mortgage to the plaintiff, as such cashier, on the same lands, to secure a prior indebtedness of Holmes to the bank, in the sum of \$7,000; that afterwards it became necessary, in order to protect the interests of the bank in the mortgaged lands, that the plaintiff should purchase the note and senior mortgage executed to the said Ross, as above stated, and accordingly, on the 30th day of November, 1878, he, as such cashier, purchased and received by proper assignment to him, as such, in writing, said note and mortgage from the said Ross, copies of which note, mortgage and assignments were filed with the complaint; that the said Charles A. Dryer, as such assignee in bankruptcy, and the said Patrick H. Dutch and Mary A. Dutch, all claimed to have some interest in the mortgaged lands, and were all required to answer as to their said interests. Wherefore the plaintiff demanded judgment on the note and a foreclosure of the mortgage. Payments of interest were endorsed on the copy of the note filed with the complaint up to and including January 1st, 1878. The last two endorsements of interest paid were as follows: "January 1, 1877, received \$300, it being the interest up to this date on the within note."

"Received on the within \$300, being the interest to this date, January 1, 1878, (of) Mary A. Dutch."

Holmes and wife and Patrick H. Dutch demurred separately to the complaint, but the complaint was held sufficient as to them. Mrs. Holmes and Patrick H. Dutch made no further defence, and Dryer made default. Holmes and Mrs. Dutch answered separately.

In her fifth paragraph of answer Mrs. Dutch pleaded in abatement that prior to the 1st day of January, 1878, she became the owner of the mortgaged lands, and then continued to be such owner; that, on the 5th day of January, 1878, she and her husband Patrick H. Dutch entered into an agreement with Armstrong Ross, who was then the owner of the note and mortgage sued on, that she should pay the interest due on the note on the first day of that month, and interest at the

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rate of ten per cent. for the year 1878, to be paid on the first day of January, 1879, and interest at the rate of eight per cent. for the year 1879, to be paid January 1st, 1880; that in consideration thereof the said Ross would extend the time for the payment of said note until the 1st day of January, 1880; that thereupon she paid to the said Ross the sum of \$300 in pursuance of said agreement; that upon receiving said sum of money said Ross reduced the said agreement to writing, and signed the same as follows:

"Whereas, Mary A. Dutch has bought of Ira N. Holmes a certain tract of land in Sugar Creek township, Boone county, Indiana, on which I hold a mortgage; and whereas, she has this day paid me \$300 interest on said note secured by said mortgage, the same being the interest up to 1st day of January, 1878: Now, then, if the said Mary A. Dutch shall pay me ten per cent. interest promptly, for this year, on said note and mortgage, on the 1st day of January, 1879, and 8 per cent. interest for the year 1879, payable on the 1st of January, 1880, I agree to extend the payment of said note and mortgage two years from this 1st of January, 1878, provided interest is paid as herein stated, January 5th, 1878.

"ARMSTRONG ROSS."

That the note and mortgage referred to in the foregoing agreement were the same note and mortgage described in the complaint; that the plaintiff afterwards purchased the note and mortgage with full knowledge of the existence of the agreement above set out, and had commenced this action before any further interest was due under such agreement. Wherefore she demanded that this action should abate.

Issue; trial by a jury; verdict for the plaintiff, finding that the sum of \$3,519.16 was due upon the note, and that the plaintiff was entitled to a foreclosure of the mortgage.

A motion for a new trial being first denied, the court adjudged that the amount found to be due by the jury was due upon the note, and decreed a foreclosure of the mortgage.

Questions are made here upon the sufficiency of the com-

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plaint as against Holmes and wife and Patrick H. Dutch upon demurrer, and upon the refusal of the court to admit the agreement in writing between Armstrong Ross and Mrs. Dutch, set out as above, in evidence at the trial.

The first objection urged to the complaint is that the bank ought to have been the plaintiff instead of Boyd.

The bank, doubtless, might have treated the assignments of the note and mortgage as having been made directly to it, and have sued as the sole plaintiff, but these assignments made Boyd a trustee of an express trust, and, hence, he was authorized to sue without joining the bank, for the benefit of which the assignments were evidently intended. R. S. 1881, section 252; Daniel Negotiable Inst., section 417; *Baldwin v. Bank*, 1 Wal. 234; *Waddle v. Harbeck*, 33 Ind. 231; *Heavenridge v. Mondy*, 34 Ind. 28; *Wolcott v. Standley*, 62 Ind. 198; *Garton v. Union City Nat. Bank*, 34 Mich. 279.

The next objection to the complaint is, that, upon the facts averred, Boyd was not permitted to purchase the mortgage from Ross for the bank, and that for that reason the assignment of the mortgage to Boyd was void.

It is true, that national banking associations can not purchase, hold, or convey real estate except in certain specified cases.

Some of these excepted cases are where real estate is mortgaged to such associations in good faith by way of security for debts previously contracted, where real estate is conveyed to them in satisfaction of debts previously contracted, in due course of business, and where they buy real estate at sales under judgments, decrees, or mortgages, held by them, or purchase that kind of property to secure debts due to them. R. S. U. S., section 5137; *Heath v. Second Nat'l Bank of Lafayette*, 70 Ind. 106.

No objection is made to the validity of the junior mortgage taken by Boyd to secure a pre-existing debt due to the bank. The authority to take this junior mortgage being conceded, the right of acquiring such further interest in the mortgaged

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lands as was necessary for the protection of the security afforded by the junior mortgage appears to us to have followed as a necessary consequence.

No restriction is imposed upon a banking association in taking a mortgage to secure a debt previously contracted. When, therefore, a national bank takes a mortgage for such a purpose, it becomes invested with all the rights which usually belong to a mortgagee. Among these is the right to protect itself, by all the usual business methods, against the disastrous consequences likely to result from older liens upon the mortgaged property. *First Nat'l Bank v. Nat'l Exchange Bank*, 92 U. S. 122. We, consequently, know of no ground on which the authority of Boyd to purchase the note and mortgage in suit, for the use of the bank represented by him, can be seriously questioned. *Upton v. Nat'l Bank*, 120 Mass. 153; *Ornn v. Merchants Nat'l Bank*, 16 Kansas, 341; *Spafford v. First Nat'l Bank*, 37 Iowa, 181 (18 Am. R. 6).

Furthermore, as has been seen, national banking associations are expressly authorized to purchase real estate, which may, of course, include any interest in such property, when necessary to secure debts already due them.

A contract for forbearance in suing upon a promissory note, or other similar instrument, in writing, after it has become a binding obligation upon the makers, must be upon some new consideration. This rule applies not only to cases in which the rights of sureties are affected, but extends to all contracts of that character. A distinct and adequate consideration is an essential requisite in all contracts of forbearance to sue. *Chitty Con.* 289; 1 *Parsons Con.* 440; 2 *Parsons Con.* 26; *Abel v. Alexander*, 45 Ind. 523 (15 Am. R. 270); *Buck v. Smiley*, 64 Ind. 431; *Starret v. Burkhalter*, 70 Ind. 285; *Lemmon v. Whitman*, 75 Ind. 318 (39 Am. R. 150).

As the note was overdue when Mrs. Dutch paid \$300 upon it as in full of interest due upon it up to the 1st day of January, 1878, the appellants' claim, upon the authority of *Burns v. Anderson*, 68 Ind. 202 (34 Am. R. 250), that it was then draw-

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ing only six per cent. interest, and that, consequently, the amount of interest paid, and agreed to be paid, by Mrs. Dutch being in excess of that rate of interest, constituted a sufficient consideration for the agreement to extend the time of payment of the note.

At the time their brief was filed this claim of the appellants raised a question of some interest with reference to some of our decided cases, but since that time the case of *Burns v. Anderson*, *supra*, relied upon, has been overruled by this court, and the doctrine of the case of *Kilgore v. Powers*, 5 Blackf. 22, re-asserted and re-established. The amount of interest which Mrs. Dutch paid, as well as agreed to pay, was not, for that reason, in excess of the lawful interest accruing, and to accrue, upon the note. *Shaw v. Rigby*, 84 Ind. 375 (43 Am. R. 96).

Neither the payment of interest already accrued, nor a promise to pay such interest as may thereafter lawfully accrue, upon a note, will afford a sufficient consideration for an agreement to extend the time of payment of the note. *Starret v. Burkhalter*, *supra*.

Mrs. Dutch neither paid, nor agreed to pay, a greater rate of interest than was specified in the note, and neither paid, nor promised to pay, any interest in advance. There was, therefore, no new consideration to support the agreement for the extension of time entered into with Ross. The agreement was, in consequence, ineffectual as a contract for forbearance, and inoperative for any other practical purpose.

The circuit court did not err in refusing to permit the agreement to be read in evidence.

Other questions have been incidentally discussed by counsel, but they are not presented in such manner as to require any decision upon them.

The judgment is affirmed, with costs.

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No. 10,807.

## LITTLE v. THE STATE.

CONTEMPTS.—*Legislative Power to Define.*—The power to protect itself from contempts and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and it is not in the power of the Legislature to prevent the one or abridge the other.

SAME.—*Proposal to Bribe Juror or Officer of Court.*—An attempt, for the purpose of gain, to create the belief that a juror or an officer of court having active duties to perform upon a trial, can be bribed, is a contempt of court.

From the Criminal Court of Marion County.

*J. B. Elam*, for appellant.

*F. T. Hord*, Attorney General, *W. T. Brown*, Prosecuting Attorney, and *C. F. Robbins*, for the State.

ELLIOTT, J.—Rudolph E. Jeter was in attendance at the trial of his son upon a charge of murder, and while visiting his son at the jail during a recess of the court, Little approached him, enquired if he was the father of the young man on trial, and, receiving an affirmative answer, said: "I am a friend of yours and would like to do you all the good I can, and think I can be of some assistance to you. I am well acquainted with the prosecuting attorney; I used to work with him at the rolling mill, and I think I can influence him." He also enquired of Jeter if he knew that money could be used on the jury, to which Jeter responded that he did not, and would not use money if he could, whereupon Little left him, saying he would see him again. A few days after this conversation took place, Little met Jeter and said to him: "There are two or three of those jurymen who live here, and I know I can have a great deal of influence over them, and if you will furnish \$200 I can assure you of the acquittal of your son." Jeter again refused to attempt to corrupt the jury, and Little then said: "If you can not get \$200, can not you get \$100; I can do a great deal of good with \$100." For a second time, Jeter met him with a re-

90	338
125	573
90	338
130	286
90	338
131	812
90	338
136	60
90	338
146	447
90	338
161	443
90	338
170	638
170	639

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fusal. A third time the proposition was renewed and a third time rejected. In the testimony given by the appellant, he admitted that he had endeavored to secure money from Jeter; denied that he had attempted or expected to corrupt any juror or officer; asserted that his purpose was not to secure money to corrupt the jury, but that he intended to swindle Jeter out of his money by false pretences of ability to corruptly influence the jurors. Appellant was adjudged guilty of contempt, and from that judgment prosecutes this appeal.

Courts of justice possess powers which were not given by legislation, and which no legislation can take from them. Judicial power exists only in the courts; it can not live elsewhere. *Underwood v. McDuffee*, 15 Mich. 361; *Chandler v. Nash*, 5 Mich. 409; *Shoultz v. McPheeters*, 79 Ind. 373. There are inherent powers resident in all courts of superior jurisdiction. These powers spring, not from legislation, but from the nature and constitution of the tribunals themselves. *United States v. Hudson*, 7 Cranch, 32; *Sanders v. State*, 85 Ind. 318 (44 Am. R. 29); *Cavanaugh v. Smith*, 84 Ind. 380; *Nealis v. Dicks*, 72 Ind. 374. The judiciary is a co-ordinate department of the government, and is not a mere subordinate branch, dependent for existence and power upon the legislative will. Purely judicial powers, inherent in courts as of the essence of their existence, are not the creatures of legislation, and these powers are inalienable and indestructible.

Among the inherent powers of a court of superior jurisdiction is that of maintaining its dignity, securing obedience to its process and rules, protecting its officers and jurors from indignity and wrong, rebuking interference with the conduct of business, and punishing unseemly behavior. This power is essential to the existence of the court. Without the power to punish for contempt, no others could, as decided in *United States v. Hudson*, *supra*, be effectively exercised. There is no doubt that the power to punish for contempt is an inherent one, for, independent of legislation, it exists, and has always existed, in the courts of England and America. It

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is, in truth, impossible to conceive a superior court as existing without such a power.

The Legislature may regulate the exercise of this power—may prescribe rules of practice and procedure, but it can neither take it away nor materially impair it. In the case of *Neel v. State*, 9 Ark. 259, the court said: "The right to punish for contempts in a summary manner, has been long admitted as inherent in all courts of justice and in legislative assemblies, founded upon great principles, which are co-eval, and must be co-existent, with the administration of justice in every country—the power of self-protection. \* \* \* \* It is a branch of the common law brought from the mother country and sanctioned by our Constitution." In another opinion by the same court it is said: "The Legislature may regulate the exercise of, but can not abridge the express or necessarily implied powers, granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government: and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and State institutions, and a favorite theory in the governments of the American people." *State v. Morrill*, 16 Ark. 384. In that case the whole subject is well discussed, and it was held that the Legislature could not restrict the power to punish for contempt to acts defined and enumerated in a statute. The Supreme Court of Illinois, in *People v. Wilson*, 64 Ill. 195, declare a like doctrine, the court saying: "This court held, in an early case, that the power to punish for contempts was an incident to all courts of justice, independent of statutory provisions. *Clark v. The People*, Breese, 340. Courts in other States have also announced the doctrine that this power is inherent in all courts of justice—necessary for self-protection, and an essential auxiliary to the pure administration of the law." In our own reports, we have cases emphatically asserting the doctrine that the power to punish for contempt is inherent in courts of justice, and exists without

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and independent of legislative enactment. *Ex parte Smith*, 28 Ind. 47; *Brown v. Brown*, 4 Ind. 627. There are many cases sustaining this doctrine, and we cite a few of the many: *State v. Matthews*, 37 N. H. 450; *Com. v. Dandridge*, 2 Vir. Cases, 408; *Ex parte Biggs*, 64 N. C. 202.

As the court possessed the inherent power to punish contempts independently of legislation, it is not material that acts such as that committed by the appellant are not defined in our statute concerning contempts of court. The fact that the act is not embraced in any of the statutory definitions of a contempt does not deprive the court of the power to treat and punish it as a contempt, if it be really such. Where the act constitutes a contempt, then the courts may so adjudge it, although it is not within the statutory provisions upon the subject. It is not the legislative declaration that constitutes an act a contempt; it may be such although there is no statute so declaring. It is, indeed, not for the Legislature to declare what the courts shall or shall not consider to be a contempt; that power rests with the judiciary; for to hold differently would result in placing the whole subject within the absolute control of the legislative department, and would thus withdraw from the courts one of the primary and essential elements of their constitution and existence.

One who does a wrongful act for the purpose of bringing unmerited disgrace upon the officers of the court, or the members of the jury, is guilty of a contempt. One who, for the purpose of securing money for himself, falsely pretends to another interested in the result of a cause, that he can corruptly influence with money the jurors trying the cause to return such a verdict as he desires, is guilty of a contempt. Such an act tends to disgrace and degrade the jury in the mind of the person to whom the corrupt proposition is submitted. No man has a right to falsely insinuate that he can, by corrupt means, influence jurors in the performance of their duty. It would be a reproach to the law, if shameless men were permitted to slander honest officers and jurors by vile insinuations; but

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the law is not subject to this reproach, for it lodges in the courts ample authority to punish such men, and to fully protect jurors and officers from such calumniators. It is the purpose of the law to secure a pure and unobstructed administration of justice, to preserve the jurors from temptation and evil, and to banish from the court-rooms all who are base enough to suggest the bribery of officers or jurors. It is also the purpose of the law that honest officers and jurors shall not be degraded or disgraced by unprincipled slanderers, who, for selfish purposes, make false charges against them. It is likewise the intention of the law that courts shall have the means of commanding merited respect not only for themselves but also for all who are engaged in the administration of the law as officers or jurors of the court.

It is not every light remark made of a juror or an officer, criticising his conduct or questioning his motives, that will constitute a contempt within the meaning of the law; but where, for the purpose of securing money, a charge is made against a juror in a pending trial that he can be corruptly influenced with money, there is a contempt, and one deserving prompt punishment. This was in effect the statement made by the appellant; it was not, as counsel ingeniously argue, like a light remark hastily dropped, or one made in angry criticism, but it was an insinuation deliberately made for a corrupt purpose, and one which tended to disgrace and degrade jurors then engaged in the discharge of their duties in a cause of great importance. The deliberate purpose in making the statement was to create in the mind of the hearer a belief that the jurors were dishonest and could be bribed, and this is very different from cases put by counsel of merely disparaging remarks made by persons of courts, officers and jurors. In the one case, there is the deliberate and corrupt purpose to create a belief of the dishonesty of the jury; in the other, these elements are absent.

Judgment affirmed.

## Bright v. The State.

No. 10,764.

## BRIGHT v. THE STATE.

90	343
125	41
90	343
141	359

**CRIMINAL LAW.**—*Change of Venue.*—*Original Papers.*—*Affidavit.*—On a change of venue in a criminal cause, the affidavit for such change of venue is not an "original paper," within the meaning of that expression as used in section 1771, R. S. 1881.

**SAME.**—*Motion in Arrest of Judgment.*—*Evidence.*—A motion in arrest of judgment in a criminal cause questions only the jurisdiction of the cause and the sufficiency of the indictment or affidavit and information; in no case does such motion call in question the sufficiency of the evidence to sustain the verdict.

From the Hancock Circuit Court.

*D. S. Gooding* and *M. B. Gooding*, for appellant.

*F. T. Hord*, Attorney General, *L. P. Newby*, Prosecuting Attorney, and *W. B. Hord*, for the State.

**HOWK, J.**—In this case the appellant was indicted, tried by a jury and found guilty of the crime of perjury; and, over his motions for a new trial and in arrest of judgment, he was sentenced to the State's prison for the term prescribed in the verdict.

In this court the only error insisted upon by the appellant is the overruling of his motion in arrest of judgment. The motion in arrest was in writing, and the following causes were assigned therein for such arrest:

1. Because the grand jury, who found the indictment, had no legal authority to enquire into the offence charged.
2. Because the facts stated in the indictment do not constitute a public offence.
3. Because the jury failed to find a verdict on the second count of the indictment, and were discharged without the defendant's consent.

In section 1843, R. S. 1881, it is provided as follows: "A motion in arrest of judgment is an application in writing, on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty or finding of the court, and may be granted by the court for either of the following causes:

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*"First.* That the grand jury which found the indictment had no legal authority to enquire into the offence charged, by reason of its not being within the jurisdiction of the court.

*"Second.* That the facts stated in the indictment or information do not constitute a public offence.

"The court may also, on its view of any of these defects, arrest the judgment without motion."

It is manifest, therefore, that the third cause assigned in appellant's motion is wholly unauthorized by the statute and affords no ground whatever for the arrest of the judgment. "A motion in arrest of judgment, in a criminal case, will lie on but two grounds: 1. That the court had no jurisdiction of the case; 2. That the facts stated do not constitute a public offence." *Merrick v. State*, 63 Ind. 327, and cases cited. If it appear on the face of the indictment or information, either that the offence charged is not within the jurisdiction of the court, or that the facts stated in the indictment or information do not constitute a public offence, a motion in arrest of judgment will lie, and must be sustained.

In the case at bar, the charge of perjury in both counts of the indictment was predicated upon an affidavit subscribed and sworn to by the appellant, at and in the county of Hancock, in this State, on the 7th day of November, 1881, before a notary public of said county. It was charged, among other things, that the affidavit was then and there made by the appellant for the express purpose of aiding and assisting Henry Presser to have and obtain a new trial in a certain criminal cause there pending before the court below, wherein the State was plaintiff and Henry Presser and another were defendants, charged with the crime of assault and battery with intent to kill and murder, said charge having been legally preferred by indictment in the circuit court of Hamilton county, in this State, against said Henry Presser and others, and the venue of said cause, as to said Henry Presser and another, afterwards legally changed to the circuit court of Hancock county, etc.

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In discussing the alleged error of the trial court in overruling the motion in arrest of judgment, the appellant's counsel say: "This motion, we think, should have been sustained by the court below, because the evidence shows that the original papers in the case of *State v. Henry Presser* (77 Ind. 274), on indictment for assault and battery with intent to kill and murder, on change of venue from the Hamilton Circuit Court to the Hancock Circuit Court, were never filed in the clerk's office of the Hancock Circuit Court. The original paper, never filed, was the affidavit for the change of venue from Hamilton county. This affidavit was an original paper in that case, without the filing of which in the clerk's office of the Hancock Circuit Court that court could have no jurisdiction of the case."

It is clear, we think, that the sufficiency or insufficiency of the evidence in a criminal cause can not be called in question by a motion in arrest of judgment. But if it were otherwise, it would seem to us that counsel are mistaken in assuming, as they do, that an affidavit for a change of venue in a criminal cause is an "original paper," within the meaning of that expression as used in section 1771, R. S. 1881, or that the jurisdiction of the court to which the change of venue is taken depends upon the filing of the affidavit for such change in the clerk's office of that court. What is meant by the expression "original papers," as used in the statute, is the original indictment, or the original affidavit and information in which the defendant is charged with a public offence. In *Duncan v. State*, 84 Ind. 204, after citing sections 1771 and 1772, R. S. 1881, this court said: \* \* \* "When these papers, the original indictment and the transcript of the proceedings of the Clark Circuit Court, were deposited in the office of the clerk of Jennings county, by the letter of the statute the jurisdiction of the court below was complete, nothing further being necessary in the court below to show that jurisdiction; and upon appeal copies of those documents and of the notation of the filing of them set

## Hogg v. Link.

forth in the transcript, and that duly certified, are sufficient to show that the circuit court had acquired jurisdiction. *Doty v. State*, 7 Blackf. 427; *Fawcett v. State*, 71 Ind. 590; *Leslie v. State*, 83 Ind. 180." *App v. State*, ante, p. 73; *Keith v. State*, ante, p. 89.

We are of opinion, therefore, in the case in hand, that the court committed no error in overruling appellant's motion in arrest of judgment.

The judgment is affirmed, with costs.

No. 9641.

## HOGG v. LINK.

**QUIETING TITLE.**—*Pleading.*—*Defences.*—*Evidence.*—In an action to quiet title to real estate, any matter of defence, either legal or equitable, may be given in evidence under the general denial.

**JUDGMENT.**—*Procurement of by Fraud.*—*Equitable Defence.*—Fraud in obtaining a judgment is an equitable defence to such judgment, under the code.

**SAME.**—*How Attacked for Fraud.*—Fraud in the procurement of a judgment constitutes ground for a direct attack upon the judgment by a party thereto, by an application corresponding to an original bill in equity.

**SAME.**—*When Vendee May Not Attack Judgment Procured by Fraud Against Vendor.*—Where a purchaser of real estate takes a conveyance with covenants of warranty, with legal notice of a judgment lien upon the land, though he pay full value, he must rely upon his grantor's covenants and the equities arising out of the relation thus voluntarily assumed, without the right to impeach the judgment for fraud practiced against the judgment defendant alone in the procurement of the judgment.

**SAME.**—*Case Stated.*—H., by a fraud practiced upon R., obtained a judgment against the latter, which became a lien upon the real estate of R., which R. afterwards sold and conveyed to L. by deed, with full covenants. Subsequently, H. became the purchaser of the land under execution issued upon his fraudulent judgment, and took a marshal's deed upon his purchase.

**Held**, that though R. could have protected his title by attacking the judgment collaterally for the fraud, yet L., his grantee, could not.

From the LaPorte Circuit Court.

90	346
124	230
90	346
131	235
132	504
90	346
136	330
90	346
137	481
139	631
90	346
140	131
90	346
159	591

90	346
4180	213
160	215

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*L. A. Cole and C. H. Truesdale*, for appellant.

*M. H. Weir, W. B. Biddle, A. C. Harris and W. H. Calkins*, for appellee.

BLACK, C.—The appellee brought suit against the appellant and three others, who have declined to join in this appeal.

The complaint alleged, that appellee was the owner in fee simple of certain land in LaPorte county, and that the defendants, and each of them, were asserting some adverse title or interest therein without foundation in law or equity, and thereby there was a cloud upon appellee's title. Prayer that appellee's title be quieted in him, and that the defendants be restrained from asserting title.

Appellant answered by general denial, and filed a cross complaint, in which he asserted his ownership of the land in fee simple, and sought to quiet his title and to enjoin his co-defendants and the appellee from asserting title.

No answer to the cross complaint appears in the record.

Two of the other defendants filed disclaimers; the third does not appear to have been notified, and he did not appear.

The cause was submitted to the court for trial, and the court, upon request, stated the facts in writing, with conclusions of law thereon, as follows:

"This cause having been submitted to the court for trial, at the request of the plaintiff, the court states in writing the facts found, as follows:

"1. The court finds, upon the admission of the defendant, made upon the trial, that upon the 21st day of March, 1870, one Benjamin Ruffner became seized by perfect title in fee simple of all the lands described in the complaint.

"2. That on the 9th day of May, 1870, the said Benjamin Ruffner conveyed all the lands described in the complaint, by warranty deed, in fee simple, to the plaintiff, which deed was duly acknowledged and recorded in the recorder's office of this county on the 7th day of July, 1870.

"3. That on the 17th day of December, 1866, the defend-

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ant Hogg recovered a judgment in the circuit court of the United States for the District of Indiana, against the said Benjamin Ruffner, for the sum of \$28,992.89, the same being the balance of a certain debt secured by mortgage, over and above the amount realized from the sale of the mortgaged premises; upon which judgment an execution was issued February 26th, 1872, levied upon the land in controversy on the 16th day of March, 1872, and, on the 19th day of April, 1872, after compliance with all the requirements of the law in advertising the same, said land was sold by the marshal; that the defendant became the purchaser at said sale of all the said lands, and the said execution was duly returned on the 27th day of July, 1872.

"4. That on the 25th day of January, 1876, the defendant received a deed of conveyance from the marshal upon said sale, conveying to him all the lands mentioned in the complaint, which deed was duly recorded by the recorder of this county, on the 2d day of February, 1876; and the defendant claims title to said lands under said marshal's deed.

"5. That prior to the rendition of said judgment in favor of the defendant against the said Benjamin Ruffner, to wit, on the 18th day of May, 1865, the defendant entered into an agreement with the said Ruffner, whereby, upon a valid and valuable consideration, the entire indebtedness upon which said judgment was rendered was fully satisfied and discharged, and it was then and there agreed between the defendant and said Ruffner that in the foreclosure proceedings then pending there should be no judgment rendered against said Ruffner for any balance of the debt secured by said mortgage so being foreclosed, over and above the amounts realized from the sale of the mortgaged premises; that after making said agreement the defendant, in the absence of said Ruffner and his attorneys, and without their knowledge or consent, caused said judgment to be entered against said Ruffner; and that said judgment was procured by the defendant through fraud.

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“Upon the foregoing facts the court states the following conclusions of law :

“1. That the said judgment rendered in the circuit court of the United States, in favor of the defendant, against the said Benjamin Ruffner, was and is void, on account of the fraud practiced by the defendant in procuring it; and that said judgment does not sustain the sale and deed of conveyance made by the marshal, under which the defendant claims title to the land in controversy.

“2. The plaintiff is the owner in fee simple of the lands described in his complaint, and is entitled to have his title thereto quieted in him as against the defendant.”

Appellant excepted to the conclusions of law, and judgment was rendered as prayed in the complaint.

Appellant moved for a new trial. The motion was overruled. The assignment of errors questions the correctness of the conclusions of law stated in the special finding, and the correctness of the action of the court in overruling the motion for a new trial.

In an action to quiet title to real estate, any matter of defence, either legal or equitable, may be given in evidence under the general denial. Sections 596, 611, 612, Code of 1852; Sections 1055, 1070, 1071, R. S. 1881; *Graham v. Graham*, 55 Ind. 23.

No question is made as to the want of an issue on the cross complaint. The parties, without objection, tried the cause as if the cross complaint had been answered by denial, and the case is to be treated here as if there had been a denial of the cross complaint.

The question which must control the decision of the case is whether the appellee could properly be permitted to attack appellant's judgment against Ruffner, by proving that it was procured by fraud.

It is a well settled and familiar doctrine, that in courts of equity a judgment may be enjoined for fraud in obtaining it, at the suit of the injured party.

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A judgment can not be thus attacked for fraud, the questions concerning which were litigated in such judgment; but fraud used in obtaining a judgment is regarded as perpetrated upon the court, as well as upon the injured party, and the judgment so obtained may be attacked therefor. Pomeroy Eq. Jur., section 919.

That the circumstances under which the judgment against Ruffner was obtained, as shown by the special finding, constituted such a fraud as would authorize the interposition of a court of equity upon a direct application by the judgment defendant for that purpose, has often been held. See *Nealis v. Dicks*, 72 Ind. 374, and cases cited; *Blakesley v. Johnson*, 13 Wis. 592; Freeman Judg., section 492.

Under the radical changes introduced by the modern procedure, resort to a separate proceeding for the purpose of obtaining equitable relief is, under some circumstances, rendered wholly unnecessary. In the one "civil action" provided by that procedure, "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights" (section 22, Code of 1852; section 272, R. S. 1881); and "The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have." Section 56, Code of 1852; section 347, R. S. 1881.

Whether, in a case requiring a decision of the question, fraud in obtaining a judgment has or has not been expressly and distinctly recognized by this court as an equitable defence under the reformed procedure, it has been so regarded and admitted by other courts and by learned expositors, and the proposition is beyond question. *Dobson v. Pearce*, 12 N. Y. 156; *Mandeville v. Reynolds*, 68 N. Y. 528; *Stowell v. Eldred*, 26 Wis. 504; *Rogers v. Gwinn*, 21 Iowa, 58; Pomeroy Eq. Jur., section 86, n. 1; *Id.*, section 919; Bliss Code Plead., section 347-351 and notes.

Ruffner was not a party to this suit. The appellee did

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not and could not complain of the judgment on Ruffner's behalf, but he sought to protect his own interest in the land against the judgment plaintiff's claim of title through the sale and conveyance of the land to him, under his judgment. At the time of its rendition, the judgment did not affect any rights of the appellee. Afterward the judgment defendant conveyed the land to the appellee by warranty deed in fee simple.

Could the appellee ask a court to interfere in his behalf, as against the conveyance to the judgment plaintiff, under his judgment?

Appellee received his conveyance, with constructive notice of appellant's judgment lien, and it does not appear from the finding whether or not he had actual notice, if that could affect the matter.

It does not appear that there was any collusion in the procurement of the judgment for the purpose of defrauding the appellee.

The burden was upon the appellee to impeach the appellant's title. He does not, upon the facts stated, appear to have any right to attack that title. *French v. Shotwell*, 5 Johns. Ch. 555; *Shufelt v. Shufelt*, 9 Paige, 137; *Marriner v. Smith*, 27 Cal. 649; Bigelow Fraud, 175.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at appellee's costs, and that the cause be remanded, with instructions to state conclusions of law in accordance with said opinion, and to enter judgment accordingly.

#### ON PETITION FOR A REHEARING.

BLACK, C.—We have examined again the question involved in this case, under a petition for a rehearing, and after careful consideration we have found no reason to modify the conclusion before reached. We take this occasion to indicate more definitely the grounds of our decision.

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A judgment of a court having jurisdiction is conclusive of the issue involved, as between the parties and their privies. Fraud in the procurement of the judgment is an extrinsic and collateral fact, and constitutes ground for a direct attack upon the judgment by a party thereto, by an application corresponding to an original bill in equity. Whether there is in this State any other mode of direct attack for such cause, as by application for a new trial, we need not here examine. Whether a party to a judgment should be permitted to impeach it collaterally for fraud in obtaining it, is a question which presents no difficulty under the code, which permits equitable defences, as we took occasion in our original opinion to show, by way of introduction and in agreement with the position assumed on that point in the argument of counsel for the appellee. But here there is no contest between the parties to the judgment. The appellant properly introduced the judgment in evidence as the foundation of his claim of title. The appellee was not a party or privy to that judgment, but was a stranger. His certain property was subject to the judgment to the extent to which it might exhaust that property, purchased by him subject to the lien thereof.

A stranger to a judgment or decree may impeach it collaterally, at law or in equity, for fraud in its concoction. This is a general statement of limited applicability, and needs illustration. It is sometimes said that fraud renders void a judgment procured thereby; and it is thereupon insisted on behalf of the appellee that the judgment in question must be treated as a nullity; but such expression, like that in reference to the impeachment of judgments and decrees by strangers, must be interpreted by the facts of the cases in which it is used. When it is said of a judgment of a domestic court, in a cause in which the court had jurisdiction of the subject-matter and of the parties, and the contrary is not pretended, that it is void because of fraud in its procurement, this must be understood in a qualified sense. It means that the judgment will be treated as a nullity when the fraud has been

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shown in a proper proceeding between proper parties, and by competent evidence. Until this has been done, the judgment, valid on its face, is voidable only, and must be treated and enforced as a valid judgment.

Counsel have mentioned no case, and we have found none, which seems to us to sustain the appellee's attack upon the judgment in question.

In *Duchess of Kingston's Case*, 2 Smith's Leading Cas. 609, it was said in the opinion of the judges, pronounced by Lord Chief Justice DEGREY: "In civil suits, all strangers may falsify, for covin" (that is, collusion), "either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practiced to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas;" and that "collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury." The case was a prosecution of the Duchess of Kingston before the House of Lords for bigamy, and the language above quoted was in an opinion in response to interrogatories propounded by the Lords. It was held by the judges that a sentence in a suit for jactitation of marriage, which was not *in rem*, but was *in personam*, brought by the defendant in the criminal action against her first husband, was not conclusive against the crown in the criminal action, the parties not being the same; and it was said that, admitting the sentence of jactitation to be conclusive upon an indictment for bigamy, the counsel for the crown might, nevertheless, be admitted to avoid the effect of such sentence by proving the same to have been obtained by fraud or collusion.

The fraud in the suit for jactitation of marriage was not fraud practiced by one party to the suit upon the other party, but was collusion of the parties, and public policy was a suf-

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ficient reason for permitting impeachment by the crown on the ground of collusion.

In *Shedden v. Patrick*, 1 Macq. Ap. Cas. 535, 607, the Lord Chancellor said he did not wish it to be understood that he concurred in the suggestion "that under no circumstances can a judgment of your Lordships' House be called in question, if it be established that it was not a judgment in a *bona fide* suit, but obtained by the fraudulent collusion of both parties, in order, either by means of that judgment, to defeat the objects of public justice, or to defeat the rights of one of the nominal parties, he being an infant, whose rights were under the guardianship of another," a colluding party, his factor *loco tutoris*. It was said, on page 620, that the only question in such cases of impeachment is whether the former judgment was a real judgment or not.

In *Harrison v. The Mayor, etc.*, 4 DeGex, M. & G. 137, on a question of legitimacy, where there was evidence of a sentence of nullity of the marriage in the consistorial court of Winchester, for want of the consent of the father of the wife, it was permitted to the heir to show in avoidance that the sentence was procured by collusion of the parties, the husband and wife, and that her father did consent.

*Meddowcroft v. Huguenin*, 4 Moore (Privy Council), 386, was a cause brought in the prerogative court, in 1842, citing the respondent to show cause why letters of administration should not be revoked. The respondent in her responsive allegation pleaded a sentence passed in 1816, in a cause in the consistorial court of London, annulling the marriage of the appellant's father and mother before the birth of the appellant, said cause having been brought by the father and guardian of the appellant's father against the appellant's mother. The appellant responded that said sentence was not valid as against the appellant, because of collusive conduct of his father and mother, by which there was no *bona fide* contestation of the suit to annul the marriage, and the true state of the facts was suppressed. It was held, on demurrer, that

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collusion would make a judgment a nullity, if between the parties, but that here, though the facts stated, if proved, might amount to fraud, there was no collusion, and the former judgment was not impeachable on the facts stated. See *Perry v. Meddowcroft*, 10 Beav. 122, 131; *Meddowcroft v. Huguenin*, 3 Curteis, 403.

The impeachments of judgments by third persons most frequent are by creditors of the judgment defendant. Judgments are expressly mentioned among the modes of defrauding creditors provided against by the statute. 13 Eliz. Ch. 5, and section 17 of our statute of frauds.

In 3 Chit. Pl. 1166, precedents are given of replications, in an action against an executor, to a plea of a judgment already recovered by a third person against the executor, and that he had fully administered, except goods of a value not sufficient to satisfy such judgment, the replication in one precedent being that the judgment was had and obtained "by the fraud and covin of the said defendant, and with the intent to defraud the said plaintiff of his debts;" and in another precedent that the defendant permitted and suffered the said judgment to pass against him for more than was due and owing from the testator to the judgment plaintiff, "by the fraud and covin of the said defendant and the said judgment plaintiff."

In *Dougherty's Estate*, 9 W. & S. 189, it was said: "It is contended, however," (by creditors) "that the judgment is fraudulent, because he who confessed it was defrauded. A surreptitious judgment, however, is fraudulent only as to the immediate parties."

In *Thompson's Appeal*, 57 Pa. St. 175, where a bond and warrant of attorney, upon which a judgment was entered, was executed by the judgment defendant upon a false representation as to the amount secured by them, it was said that the judgment defendant was the only person who could set aside the judgment for that reason; that his judgment creditors might attack a judgment collaterally when it was a fraud upon them, as where there had been collusion between the

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debtor and the creditor, but they could not set it aside merely because it was a fraud upon the debtor; that if the judgment defendant had been defrauded into giving a judgment, it could not have been given with a secret agreement to defraud others. His consent being wanting, there was no collusion. See, also, *Drexel's Appeal*, 6 Pa. St. 272; *Lewis v. Rogers*, 16 Pa. St. 18; *State v. Fife*, 2 Bailey, 337; *Den. v. Gaston*, 4 Zab. 818; *Candee v. Lord*, 2 N. Y. 269; *Gere v. Gundlach*, 57 Barb. 13; *Harker v. Glidewell*, 23 Ind. 219; *Adkins v. Nicholson*, 39 Ind. 535; *Feaster v. Woodfill*, 23 Ind. 493; *Harbaugh v. Hohn*, 52 Ind. 243; *McAlpine v. Sweetser*, 76 Ind. 78; *Bump Fraud. Convey.* 17, 18.

A mortgagee may collaterally impeach a judgment affecting him, entered by collusion, but not a judgment recovered through fraud practiced by the judgment plaintiff upon the judgment defendant, the mortgagor. *Mason v. Messenger*, 17 Iowa, 261; *Hackett v. Manlove*, 14 Cal. 85; *Esty v. Long*, 41 N. H. 103; *De Armond v. Adams*, 25 Ind. 455.

A surety may collaterally impeach a judgment rendered against his principal, where it was obtained by collusion between the creditor and principal debtor to defraud the surety. *Riddle v. Baker*, 13 Cal. 295; *Douglass v. Howard*, 24 Wend. 35; *Annett v. Terry*, 35 N. Y. 256; *Bridgeport, etc., Co. v. Wilson*, 34 N. Y. 275; *Great Falls, etc., Co. v. Worster*, 45 N. H. 110; *Beyer v. Williams*, 4 McLean, 577; *People v. Downing*, 4 Sandf. 189; *Bigelow Est.*, 3d ed., 97, n. 1.

The rights of persons to the title of lands may not be shifted and postponed to their juniors by merely colorable proceedings, to which such persons are not parties, and which are collusively conducted for the purpose of cutting off the prior title; and a judgment so obtained may be impeached for fraud by the stranger thereto, whose existing title is affected by it, and to defraud whom it was obtained. *Atkinson v. Allen*, 12 Vt. 619; *Webster v. Reid*, 11 How. 437; *Caswell v. Caswell*, 28 Maine, 232; *Inman v. Mead*, 97 Mass. 310.

A purchaser of real estate for a valuable consideration is

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protected by statute (27 Eliz. ch. 4; sections 12 and 13 of our statute of frauds), but the fraud from which he is so protected must be the fraud of one under whom he claims title, and if he purchase with actual or legal notice of a prior fraudulent conveyance, there must have been collusion to avail him.

A judgment confessed without authority could not be set aside, directly or collaterally, by a terre-tenant, who came in under the defendant. It was said: "Even a collusive judgment, though a nullity as to creditors, is conclusive between the parties to it; and a terre-tenant claiming by conveyance from the defendant, stands on no higher ground." *Davidson v. Thornton*, 7 Pa. St. 128.

In *French v. Shotwell*, 5 Johns. Ch. 555, cited in our original opinion, the original judgment was upon a bond and warrant of attorney, and constituted a part of the fraudulent imposition (see *Shufelt v. Shufelt*, 9 Paige, 137, 147; *Mason v. Messenger*, 17 Iowa, 261; *Wilhelmi v. Leonard*, 13 Iowa, 330). It was said: "TenBroeck, the original party to the judgment, might have impeached it for fraud." This, of course, could not have been for matter of mere defence. The Chancellor further said, speaking of the original judgment: "If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. \* \* Feuds and litigation would be interminable, if any distinct purchaser of distinct parcels of land, affected by a judgment, existing, and known when they became interested, could overhaul the judgment upon an allegation of usury, extortion or fraud, practiced upon their principal, the vendor, when he himself chooses to acquiesce in the alleged injury, or has expressly waived all complaint. It is stated to have been a principle of the common law, that a fraud could only be avoided by him, who had a prior interest in the estate affected by the fraud, and

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not by him who, subsequently to the fraud, acquired an interest in the estate. (*Upton v. Basset*, Cro. Eliz. 445, and recognized in 3 Co., 83 a.) \* \* The judgment precludes, on general principles; for the purchaser voluntarily comes in under the judgment, *pro bono et malo*, and except in the special case in which the judgment was confessed collusively, and by a corrupt agreement to defraud some subsequent purchaser (a case hardly to be supposed), he must take the lien as he finds it, and has no business to interfere with the contracts of other people."

Counsel direct our attention to the fact that in *Marriner v. Smith*, 27 Cal. 650, cited in our original opinion, the court permitted the plaintiff to amend his pleadings. This was because the pleadings did not clearly show whether or not the judgment was a lien upon the real estate conveyed. If it could be shown that it was not a lien, the grantee might be relieved, though the judgment could not be impeached by the purchaser for fraud against the judgment defendant.

There was evidence on the trial of the case at bar, that the appellee paid a valuable consideration for the land, though this was not shown in the special finding. If he took by warranty deed, paying full value for the land, he would have the equities of one whose land is bound for another's debt. But where one takes such a conveyance, with legal notice of a judgment lien upon the land, though he pay full value, he must rely upon his grantor's covenants and the equities arising out of the relation thus voluntarily assumed, without the right to impeach the judgment lien for fraud practiced against the judgment defendant alone in the procurement of the judgment. We know of no principle of law or equity or statutory provision authorizing him to impeach the judgment.

PER CURIAM.—The petition for a rehearing is overruled.

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The State, *ex rel.* Hord, Att'y General, v. Board Comm'rs of St. Joseph Co.

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No. 10,713.

THE STATE, EX REL. HORD, ATTORNEY GENERAL, v.  
BOARD OF COMMISSIONERS OF ST. JOSEPH COUNTY.

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**SCHOOL FUNDS.**—*Tuition.*—*Misappropriation.*—*Statute of Limitations.*—*Office and Officers.*—*Fees.*—The statute of limitations of 1852 does not bar a recovery against a county for misappropriation of funds donated by the Constitution and laws exclusively to tuition in the common schools; and the appropriation of any part of it to the payment of officers' fees for collecting or managing the funds is wholly unauthorized, and a violation of a trust which it is not in the power of a county to deny.

From the St. Joseph Circuit Court.

*F. T. Hord*, Attorney General, for appellant.

*A. Anderson*, for appellee.

**HAMMOND, J.**—The Attorney General, October 23d, 1882, filed the following claim before the county board of St. Joseph county:

*“William D. Smith, Esq., Auditor of St. Joseph County, Indiana:*

“DEAR SIR: Under the school law of 1855 the income derived from interest on loans of the common and congressional school funds, together with the tax collected for common school purposes, must be used exclusively for tuition in the common schools of the State; and, whereas, a part of the revenues so collected in St. Joseph county have been diverted from the purpose set forth, viz.:

“To the payment of officers' fees for managing and disbursing the same (which fees should have been paid out of county funds), as follows:

Com'rs' Record 4, p. 102, cong'al school interest .	\$ 60 74
“ “ “ 103, common “ “	37 80
“ “ “ 154, common and congressional school interest . . . .	123 15
Com'rs' Record 4, p. 222, cong'al school interest .	75 19
“ “ “ 224, common “ “	46 27
“ “ “ 256, common and congressional school interest . . . .	135 65

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*The State, ex rel. Hord, Att'y General, v. Board Comm'rs of St. Joseph Co.*

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Com'rs' Record 4, p. 530, common and congressional  
school interest . . . . 84 88

Total . . . . . \$563 68

"I also find, upon examining the settlements made by your treasurer with the Treasurer of State, that fees for collecting the school tax were charged and withheld at settlement as follows:

April, 1856 . . . . .	\$ 99 04
April, 1857 . . . . .	98 15
April, 1858 . . . . .	96 12
April, 1859 . . . . .	89 42
April, 1860 . . . . .	142 55
April, 1861 . . . . .	133 34

Total . . . . . \$658 62

Less amount charged to State . . . . . 92 54

\$566 08

"You are hereby respectfully requested to issue your warrant upon the county treasurer in my favor for \$563.68, the same to be receipted back into the treasury, to the credit of school revenue, for distribution in St. Joseph county, and for \$566.08 to be by me paid to the Treasurer of State to credit of State school revenue.

D. P. BALDWIN,

"Attorney General of Indiana."

The county board refused to allow the claim. The Attorney General appealed to the court below. The appellee answered in three paragraphs. The first was the six years, the second the fifteen years, and the third the twenty years statute of limitations; each alleged that the appellant's cause of action did not accrue, within the period named, before September 19th, 1881: The appellant's demurrer to each paragraph of the answer was overruled, and an exception taken. The appellant declining to amend, judgment was rendered "that the plaintiff take nothing by this action, and that the defendants recover of the plaintiff their costs."

The overruling of the demurrer to the answer, and the rendering of judgment in favor of the appellee for costs, are assigned as errors.

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The State, *ex rel.* Hord, Att'y General, v. Board Comm'rs of St. Joseph Co.

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As no exception was taken to the judgment for costs, the record presents no question upon that point.

The only question before us is whether the appellee's answer, or any paragraph of it, stated facts sufficient to bar the appellant's action.

Prior to the present code, which went into force September 19th, 1881, the State was barred by the limitations of actions the same as persons. Section 224, 2 R. S. 1876, p. 129. And where an action is fully barred by a statute, its repeal does not revive the cause of action.

The funds referred to in the appellant's claim are what are denominated "school revenue for tuition." It appears from this claim, which is not denied by the answer, that the officers' fees for managing and disbursing that part of the fund derived by interest from the "common school fund" and from the "congressional school fund," were paid out of such tuition fund; and that the treasurer's fees for collecting the school tax were paid out of the same.

Section 3, of article 8 (sec. 184, R. S. 1881), of the Constitution of the State, provides that the income, which is the interest, of the common school fund, "shall be inviolably appropriated to the support of common schools, and to no other purpose whatever."

Section 6, of the same article (sec. 187, R. S. 1881), provides that "The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon."

Section 7, of the same article (sec. 188, R. S. 1881), provides that "All trust funds held by the State shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created."

By sections 1 and 2, of the common school law of 1855, 1 G. & H. 542-3, the income of the common school fund, and the taxes levied and collected for tuition, were required to be applied exclusively to furnishing tuition in the common schools of the State. The same provisions, substantially, are con-

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Board of Commissioners of Orange County v. Ritter *et al.*


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tained in the school law of 1865, still in force. Section 4325, R. S. 1881.

Provisions are made for payment out of the county fund of the fees of officers for collecting, managing and disbursing the tuition fund. Sections 5909, 5927 and 5928, R. S. 1881.

From the constitutional and statutory provisions above referred to, it is manifest that with reference to common school funds the State and the county act simply as trustees for the benefit of the school children of the State. We think that the above provisions are entirely inconsistent with any statute of limitations that can be relied upon to protect the county from the execution of its trust. It can not repudiate or disavow its trust; and, where, as in the present case, it misappropriates common school funds, no failure of the proper officials to bring suit for any length of time, after notice of the misappropriation, can be set up by way of limitation to the action, to the prejudice of the beneficiaries of the trust.

Our conclusion is that the statute of limitations is inapplicable to this case.

Judgment reversed, with instructions to the court below to sustain the demurrer to each paragraph of the answer.

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No. 10,066.

BOARD OF COMMISSIONERS OF ORANGE COUNTY v. RITTER ET AL.

**BOARD OF COMMISSIONERS.**—*Statement of Claim.*—*Itemized Account.*—*Pleading.*—Under section 5761, R. S. 1881, in force since May 6th, 1853, in presenting a claim to the board of commissioners for allowance, no formal complaint is necessary in the statement of such claim; but an itemized account, giving "a detailed statement of the items and dates of charge," is sufficient. On this point *Board, etc., v. Hon.*, 87 Ind. 356, is overruled. **SAME.**—*Township Trustee.*—*Overseer of the Poor.*—*Medical or Surgical Services to Paupers.*—*Contract by County Board with Physicians and Surgeons.*—*Duty of Township Trustee.*—*Defence.*—Under the statutes of this State, the paupers of each county must, in any event, receive necessary medical or

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143 370  
90 362  
148 148  
90 362  
164 606

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Board of Commissioners of Orange County v. Ritter *et al.*

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surgical attention at the expense of the county. It is the duty of the county board to contract with physicians to attend upon the poor generally in the county; but the township trustee, as overseer of the poor, has the oversight and care of all poor persons in his township, so long as they remain a county charge, and must see that they are properly relieved and taken care of. Where a physician or surgeon is employed by a township trustee to attend upon a pauper in his township, if the county board had at the time of such employment and service a contract with some other physician or surgeon to attend upon the poor of such township, this is matter of defence, to be shown by the county board, to any claim presented for allowance by the physician or surgeon employed by such township trustee.

**SAME.**—*Contract with Physician or Surgeon.—Judicial or Administrative Duties.—Parol Evidence.*—In making a contract with a physician or surgeon for attendance upon the poor generally of the county, the county board does not act judicially, but in the discharge of an administrative duty; and while the minutes of the county board ought to show a memorandum at least of such contract, yet, if they fail to do so, the contract is not thereby invalidated, but may be established by parol evidence.

**PRACTICE.**—*Certificate of Township Trustee.—Competent Evidence.—Error.*—Where the certificate of a township trustee is made a part of the claimant's demand, as presented to the county board, the admission of such certificate in evidence is not an error available for the reversal of the judgment.

From the Orange Circuit Court.

*W. Farrell*, for appellant.

*T. B. Buskirk*, for appellees.

**HOWK, J.**—The appellees, John A. Ritter and Theophilus P. Carter, under the firm name of Ritter & Carter, presented to the appellant for allowance two claims or accounts, each for medical and surgical services rendered by them, at the request of the township trustee, to paupers of Orange county. Each of these claims was disallowed by the appellant, and from its action in each case an appeal was taken by the claimants to the circuit court of the county. The two cases were there pending on the 23d day of January, 1882, at an adjourned term of the court, and, by agreement of the parties, were then and there consolidated.

Issues were formed in the consolidated cause, and were submitted to a jury for trial, and a verdict was returned for

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Board of Commissioners of Orange County v. Ritter *et al.*


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the appellees, assessing their damages in the sum of \$55.50. Over the appellant's motion for a new trial, and its exception saved, the court rendered judgment against it and in appellees' favor for their damages and costs.

In this court the appellant has assigned the following errors :

1. The complaint does not state facts sufficient to constitute a cause of action ;
2. The court erred in overruling the demurrer to the complaint ; and,
3. The court erred in overruling the motion for a new trial.

The first two of the alleged errors call in question the sufficiency of the appellees' cause of action or claim against the appellant, the one before, and the other after, the verdict of the jury. As we have already said, the appellees, in their firm name of Ritter & Carter, presented to the appellant, for allowance, two claims or accounts, in substance as follows :

1. "*Orange County, Indiana, to Ritter & Carter, Dr.*

"To services rendered Ide Beck, June 17th, 1881,	
accouchement of wife . . . . .	\$10 00
"To services rendered Samuel Owens, pauper, ad-	
justing fracture of femur, March 8th, 1881 . . .	10 00
"To services rendered Sarah Hanmer, pauper, ac-	
couchement and delivery with instruments, Feb-	
ruary, 1881 . . . . .	25 00

"Total . . . . .	\$45 00."
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This account was verified by the affidavit of John A. Ritter, and is followed in the record by an order as follows :

"OFFICE OF TRUSTEE OF ORANGEVILLE TOWNSHIP,

"ORANGE COUNTY, IND., June 17th, 1881 :

"DR. JOHN A. RITTER: You are hereby authorized to attend the wife of Ide Beck, a poor person of this township, during her sickness, which is now imminent, and charge the same to account of Orange county.

"Respectfully and truly yours,

(Signed) "WILL T. HICKS, Trustee."

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Board of Commissioners of Orange County v. Ritter *et al.*


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Then follows in the record a certificate in substance as follows:

"ORANGEVILLE, IND., September 6th, 1881.

*"To the Board of Commissioners of Orange County:*

"The claim of Dr. John A. Ritter for attention given to Samuel Owens, a pauper, broken leg, last February, and also to Sarah Hanmer, a pauper, child-birth, same month, is just and should be paid. (Signed) WILL T. HICKS,

"Trustee Orangeville Township."

2. Appellees' second cause of action was stated substantially as follows:

"PAOLI, IND., September 6th, 1881.

*Orange County, Indiana, to John A. Ritter and Theophilus P. Carter, partners, doing business under the name of Ritter & Carter, Dr.*

"To services rendered James Mitchell, pauper.

(Items omitted from January 26th to March 28th, 1881). Total . . . . . \$35 00."

This claim was verified by the affidavit of John A. Ritter, and with it was filed an order in substance as follows:

"NORTHWEST TOWNSHIP, February 3d, 1881.

"DR. JOHN A. RITTER—SIR: You are authorized to give James Mitchell, a pauper of this Northwest township, such medical and surgical aid as his case demands.

(Signed) "JAMES W. McCAULEY,

"Trustee Northwest Township."

In discussing the sufficiency of the appellees' claim or cause of action, the appellant's counsel says: "The point we desire to make against the complaint is, that before a physician can recover in an action against a board of commissioners for medical services rendered to the poor, he must allege in his complaint, and prove on the trial, that the board of commissioners had made no provision for medical attendance on the poor of the township wherein the services were rendered, or that there existed such an emergency as precluded the attendance of the regularly employed physician."

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What must be alleged in appellees' claim or cause of action is properly called in question by the first two alleged errors; but neither of these errors presents any question in relation to what the appellees must "prove on the trial." Appellant's counsel bases his argument against the sufficiency of appellees' claim or cause of action in this case upon the provisions of section 5764, R. S. 1881. This section took effect on the 5th day of March, 1859, and has never been expressly repealed. In this section it is provided as follows:

"It is hereby specially made the duty of such board to contract with one or more skilful physicians, having knowledge of surgery, to attend upon all prisoners confined in jail, or paupers in the county asylum, and" (the board) "may also contract with physicians to attend upon the poor generally in the county; and no claim of a physician or surgeon, for such services, shall be allowed by such board except in pursuance of the terms of such contract: *Provided*, That this section shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require."

Counsel says, *arguendo*: "Under the provisions of this section, it would seem that a complaint, to show a good cause of action against a board of commissioners, should negative the existence of the very state of facts which, if they do exist, would prohibit the board from making any allowance for such services. If such allegations are necessary in an action originally instituted in the circuit court, no reason is apparent why they are not as essential in a claim filed before the board of commissioners."

The gist of this argument, as we understand it, as applied to the case in hand, is, that appellees' claims against the appellant were bad on demurrer thereto, for the want of facts, because they did not contain a negative averment to the effect that at the time the services were rendered the appellant had not provided by "contract with one or more

skilful physicians, having knowledge of surgery," for such medical and surgical services to the paupers in the townships mentioned as they required. We are of opinion, however, that such a negative averment was not at all necessary to the sufficiency of appellees' claim or cause of action, even if the suit thereon had been "originally instituted in the circuit court." In section 6071, R. S. 1881, in force since May 6th, 1853, it is provided as follows: "The overseer of the poor in each township shall have the oversight and care of all poor persons in his township so long as they remain a county charge, and shall see that they are properly relieved and taken care of in the manner required by law." In *Conner v. Board, etc.*, 57 Ind. 15, on the subject of the employment of such medical or surgical services as paupers may require, this court said:

"The spirit and intention of the legislation of this State, on this subject, seem to require that the paupers of each county shall, in any event, receive necessary medical or surgical attention, at the expense of the county. The county board may 'contract with physicians to attend upon the poor generally in the county,' and, in case of such contract, the law provides, that 'no claim of a physician or surgeon for such services shall be allowed by such board except in pursuance of the terms of such contract.'" Section 5764. "The expense of all such services, under such employment, is a proper charge against the county."

It will be observed that section 5764, by the express terms of its proviso, "shall not be so construed as to prevent the overseers of the poor, or any one of them, in townships not otherwise provided for, from employing such medical or surgical services as paupers within his or their jurisdiction may require." In the light of this proviso, as construed with other statutory provisions on the same subject, we are of opinion that the appellees' claims, in this case, were sufficient to withstand the demurrer thereto; and that the fact, if it were the fact, that the appellant had, at the time specified in such claims,

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Board of Commissioners of Orange County v. Ritter *et al.*

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a "contract with physicians to attend upon the poor generally in the county," was not a fact to be negatived by the appellees in their claims, but it was one to be shown by the evidence of the appellant as matter of defence.

Under the provisions of section 5761, R. S. 1881, in force May 6th, 1853, and still in force, "the claimant shall file with such commissioners a detailed statement of the items and dates of charge." This is all the complaint or cause of action the statute requires, or has required for more than thirty years, in such a case as the one at bar. In *Board, etc., v. Wood*, 35 Ind. 70, the appellee's claim or cause of action was an itemized account, and, upon demurrer thereto, this court said: "The facts stated in the claim, or account, are sufficient. No formal complaint in such a case is necessary. In presenting claims to the board of commissioners for allowance, it is sufficient to make out the account in the form used in this case, and the law does not contemplate the filing of a new complaint in the appellate court." So, in *Board, etc., v. Shrader*, 36 Ind. 87, where the appellee's claim or cause of action was a mere statement of account, and it had been assigned as error that the claim did not state facts sufficient to constitute a cause of action, this court said: "We think this claim was sufficient. It was not necessary to allege in it all steps, which the law required to be taken to render the county liable. Under the allegation that the county was indebted to him, we think the claimant might introduce evidence of the facts necessary to show the liability." So, also, in *Board, etc., v. Adams*, 76 Ind. 504, this court said: "Fault is found with the structure of appellee's claim or complaint, and doubtless, if the action had been commenced in the circuit court, the criticism of counsel would have prevailed. The same strictness in pleading is not, however, required in the commissioners' court as in courts of general superior jurisdiction. In the case of *The Board, etc., v. Wood*, 35 Ind. 70, it was said: 'No formal complaint, in such a case, is necessary.' A claim in the form of an ordinary account is sufficient. *The Board,*

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Board of Commissioners of Orange County v. Ritter *et al.*

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*etc.*, v. *Shrader*, 36 Ind. 87; *Jameson v. The Board, etc.*, 64 Ind. 524.”

It is clear, we think, from the language of the statute and from the previous decisions of this court, that the appellees' claims in the case in hand stated facts sufficient to constitute causes of action, and that the demurrers thereto were correctly overruled.

Whatever was said in *Board, etc.*, v. *Hon*, 87 Ind. 356, which may seem to be in conflict with what is said in this opinion, and with the previous decisions of this court herein cited, must be regarded as overruled.

Under the alleged error of the court in overruling the motion for a new trial, the first question presented by the appellant's counsel in argument, relates to the sufficiency of the evidence to sustain the verdict. In discussing this question counsel concedes at the outset that the evidence clearly shows that the services sued for were rendered by the appellees to the parties named, and at the times mentioned, and were of the value charged therefor. Counsel says: “The position of the appellant is, that at the time and under the circumstances under which the services were rendered, the county was not liable therefor.” In support of this position, counsel then enters upon an elaborate and lengthy review of the evidence in the record. It is unnecessary, and, we think, would be unprofitable, for us to follow counsel in his examination of the evidence. From our reading of the evidence, as it appears in the record, it seems to us that it fairly tended to sustain the verdict of the jury on every material point. In such a case, as we have often decided, we can not disturb the verdict on the evidence; nor can we say, from the evidence, that the damages assessed were excessive; indeed, if the assessment of damages had been larger than it was, it would have seemed to us to have been warranted by the evidence.

Appellant's counsel also insists that the trial court erred in permitting the appellees to prove, by oral evidence, a parol

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Board of Commissioners of Orange County v. Ritter *et al.*

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contract between them and the appellant, under which they rendered the medical and surgical services to the paupers named in the complaint, and sued for in this action. The court did not err, we think, in the admission of this evidence. While it is no doubt true that such a contract should be reduced to writing in some manner, yet the statute does not require a written contract, nor make its validity dependent upon formalities of any kind. In making contracts with physicians to attend upon the poor generally in the county, the board of commissioners acts in an administrative capacity, and not as a court, in the discharge of a duty imposed upon the board by statute. Doubtless, the minutes of the county board ought to show in some way the making of such a contract; but if they do not—if, through oversight or otherwise, no note or memorandum of the contract is entered upon the minutes of the board, we are clearly of the opinion that the contract is not thereby invalidated, and, in such case, its terms and conditions may be shown by parol evidence. Thus, in *McCabe v. Board, etc.*, 46 Ind. 380, this court said:

“We do not find any case which decides that the board, when acting as a corporation merely, must enter its action of record, to make it binding upon the county, or that requires that, in proving such act, it must be proved by a record made under the direction of the board. We have not discovered anything in the statute relating to the board of commissioners, or its powers and duties, which would seem to prevent it from contracting within its legitimate sphere as other corporations may contract. \* \* \* \* If we are correct in this view of the question, the commissioners may contract in the same manner as any other corporation. The rule relating to the manner in which a corporation may bind itself has in modern times undergone a great change. In the work of Angell & Ames on Corporations, section 237, the rule is laid down, ‘that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done

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Board of Commissioners of Orange County v. Ritter *et al.*

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under the corporate seal; that it may as well be bound by express promises through its authorized agents, as by deed; and that promises may as well be implied from its acts and the acts of its agents, as if it had been an individual.'" *Ross v. City of Madison*, 1 Ind. 281; *Board, etc., v. Slatter*, 52 Ind. 171; *Halstead v. Board, etc.*, 56 Ind. 363.

If the county board may bind the county by a parol contract, and surely it may, it follows of necessity that such contract may be proved by parol evidence.

It is insisted by appellant's counsel that the court erred in permitting one of the appellees, as a witness, to give in evidence a conversation between himself and the members of the county board, while in session, upon the presentation of the claims in suit. It is claimed that the evidence was calculated to, and did, mislead and confuse the jury; but we do not think that it had such tendency or effect. Its tendency was to show that the appellant, at the time, recognized its liability to the appellees for their surgical services to paupers. The evidence seems to us to have been of little weight or importance, but we think it was competent for what it was worth.

Appellant's counsel claims that the court erred in admitting, as evidence, the writing addressed to the appellant and signed by the township trustee, under date of September 6th, 1881. This writing appears to have been a part of the claim or cause of action presented by appellees to the appellant, and, as such, it is heretofore set out in this opinion. The writing constituted a part of the proceedings in the case, and there was no error in its admission in evidence. *New Albany, etc., Plank Road Co. v. Stallcup*, 62 Ind. 345.

Finally, it is claimed by appellant's counsel that the trial court erred in excluding evidence offered by appellant for the purpose of showing that during the time the appellees' services to the paupers named were rendered, the appellant had a contract with Dr. John A. Ritter, Jr., for his services as a physician to the poor in Orangeville and Northwest townships, in Orange county; that the said Ritter, Jr., gave bond

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 Davis v. Watts, Administrator.
 

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as such physician, and that for his services, as such physician, he had been paid by the appellant. The offered evidence was excluded by the court on the ground of its irrelevancy and incompetency. The court did not err, we think, in excluding this evidence from the jury, for it did not show, nor tend to show, that the appellant had not made the contract, under which appellees' services were rendered, precisely as the same was stated in their evidence. It was not controverted in appellees' evidence that the appellant had not contracted with Dr. John A. Ritter, Jr., for medical services to the paupers in the townships mentioned; but the appellees claimed that the services for which they sued were rendered under appellant's contract with them for such surgical attention as the paupers of those townships might require. Manifestly, therefore, the offered evidence was irrelevant, and on this ground, we think, was properly excluded.

A careful examination of the record of this cause has led us to the conclusion that there is no error therein which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

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 No. 10,165.

### DAVIS v. WATTS, ADMINISTRATOR.

**LANDLORD AND TENANT.—Use and Occupation.—Agreement.—Husband and Wife.**—A widow and widower, each owning a farm and having children, married, and thereafter the two families were merged, the husband supporting both, cultivating and improving and paying taxes on both farms, and the unconsumed profits going into his personal estate. There was no agreement to pay rent to the wife.

**Held,** that the relation of landlord and tenant did not exist, and that upon the death of the husband the wife could not recover from his estate for his use and occupation of her lands.

From the Hendricks Circuit Court.

*L. M. Campbell* and *J. T. Burns*, for appellant.

*J. V. Hadley*, *E. G. Hogate* and *R. B. Blake*, for appellee.

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Davis v. Watts, Administrator.

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ZOLLARS, J.—Appellant filed a claim against appellee, as the administrator of the estate of James Davis, deceased, “for the occupation and use” of a farm from 1860 to 1878, “at \$200 per year.”

The court made a special finding of facts, with a conclusion of law that appellant was not entitled to recover.

It is contended that the court erred in this conclusion. That is the question for decision. The main facts, as found by the court, are, that in 1860 appellant was a widow and James Davis a widower; each had minor children, and each owned a farm. They were married in that year, and, uniting their families, moved upon appellant’s farm and lived there as one family until the death of Mr. Davis, in 1879. During that time Mr. Davis managed, controlled and superintended the two farms, paid the taxes and received all of the rents and profits. The surplus, after paying the taxes and keeping the family, went into other personal property and improvements on the lands of both, and at his death to his administrator.

During his life Mr. Davis never accounted to appellant for any rents and profits, nor was he ever requested, or expected so to do, so far as shown by the special finding of facts. What improvements were made upon appellant’s farm, how much that farm produced, what amount of surplus is in the hands of appellee, as administrator, whether any part of it is from appellant’s farm, are not shown by the special finding of facts.

It is found that during the last six years of the life of Mr. Davis the rental value of appellant’s farm was \$150 per annum, and, prior to that time, \$75 per annum, over and above the taxes and improvements thereon.

Under the common law, the husband was entitled to the rents and profits of the wife’s real estate. As a part of the legislation of this State enlarging the rights of married women, section 5116, R. S. 1881, was enacted, which declares that the wife’s lands, and the profits therefrom, shall be her separate property as fully as if she were unmarried: “*Provided,*” etc. Under this statute it has been frequently decided

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Davis v. Watts, Administrator.

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by this court that the husband can become the owner of such profits only by the gift of the wife, express or implied.

Upon this section of the statute, and the decision thereunder, appellant relies for a reversal of the judgment. It will not be necessary for us to notice in detail the scope of these decisions; we may say of them in general, that they have been made in cases where the controversy was about annual crops, or for the value of the same, or to charge the husband as trustee for the wife. The case at bar, we think, is not such a case. It will be noticed that the claim, as filed, is not for any specific, nor any number of crops raised on appellant's lands by the deceased husband, nor for the value of the same, nor to charge the husband, or his administrator, as a trustee, but for the "occupation and use" of the lands. If there can be a recovery, it must be upon that ground. To base it upon any other ground would be to lose sight of the case as instituted.

This action can be maintained only upon the ground that the deceased husband was in some sense the tenant of his wife, the appellant. The rules of pleading in cases of this character are not so strict as in some other cases, but the nature of the claim must be stated, and, when stated, the proof and judgment must conform thereto. It is evident, from the special finding of facts, that the case was tried below on the claim for "occupation and use." The rental value is found, but there is no finding as to the value of the annual crops or profits from the land. It seems to have been conceded that the husband was the owner of such profits each year.

Do the facts found show that the deceased husband was in any sense the tenant of his wife, the appellant? There is no affirmative finding that he was such tenant, nor that there was any agreement between the husband and wife that he should occupy and use her farm as a tenant, or in any way be liable for the rental value; nor can such an agreement, tenancy or liability, be inferred from the facts found; the legitimate inference is to the contrary.

## Rinker v. Bissell, Trustee.

The fact that these people were husband and wife must not be overlooked. They, with their children, lived upon the land as one family for about eighteen years, and used the lands of each in common. Out of the profits from the two farms the family was supported, the taxes paid and the farms improved. The surplus of profits in the hands of the administrator is from the two farms. From such facts alone, as between husband and wife, neither a tenancy, nor liability for occupation and use, will be implied. As bearing directly and indirectly upon this proposition, see *Stout v. Perry*, 70 Ind. 501; *Hays v. McConnell*, 42 Ind. 285, and cases cited; *King v. Kelly*, 28 Ind. 89; *Wills v. Wills*, 34 Ind. 106; *Tyler v. Burrington*, 39 Wis. 376; *Lyon v. Green Bay, etc., R. W. Co.*, 42 Wis. 548; *Hill Trustees*, 425; *Roper v. Roper*, 29 Ala. 247; *Smith v. Denman*, 48 Ind. 65; *Grossman v. Lauber*, 29 Ind. 618.

To enable her to recover in this action, the burden was upon appellant to establish an agreement of tenancy, or some agreement to pay for the use and occupation of her land.

Upon these questions the special finding of facts is silent, and, as to such questions, that is equivalent to a finding against her. *Ex Parte Walls*, 73 Ind. 95; *Graham v. State, ex rel.*, 66 Ind. 386; *Ayers v. Adams*, 82 Ind. 109.

It results from what we have said, that the conclusion of law by the court below is the proper one from the facts found, and that the judgment should be affirmed. It is, therefore, affirmed, at the costs of appellant.

No. 10,947.

## RINKER v. BISSELL, TRUSTEE,

TRUST AND TRUSTEES.—*Non-Resident.*—*Statute Construed.*—Section 2988, R. S. 1881, has no retrospective operation, and only forbids the appointment of non-resident trustees by deed, mortgage or writing. It does not affect trusts created by operation of law.

90	375
128	230
90	375
145	505
90	375
148	115

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*SAME.—Parties.—Express Trust.—Sheriff's Sale.*—A trustee to whom, before the statute, R. S. 1881, section 2988, took effect, real estate had been conveyed in trust to secure the payment of bonds, is trustee of an express trust, may, under section 252, sue in his own name to foreclose, without joining the bondholders, and may, at sheriff's sale, under the decree, purchase the lands, and upon thus acquiring title will hold as such trustee by operation of law, with power to sell and convey.

From the Marion Circuit Court.

*J. Coburn and W. Irvin*, for appellant.

*D. M. Bradbury*, for appellee.

*NIBLACK, C. J.*—The complaint in this case represented that George P. Bissell, styling himself trustee, on the 1st day of April, 1883, entered into a written contract with Caleb P. Rinker, for the sale of lot No. 11 of Butler's Subdivision of Outlot No. 180, in the city of Indianapolis, agreeing to convey said lot by a deed warranting against all such incumbrances as he might have placed on the same, in consideration of the sum of \$5,000, which Rinker was to pay on receipt of a deed for the lot. The complaint further represented that Bissell had executed and tendered to Rinker a good and sufficient deed of conveyance, according to the terms of the contract, but that Rinker had refused to accept the deed and to pay the purchase-money, concluding with a demand for a specific performance of the contract.

Rinker answered, admitting the execution of the contract and the tender of the deed, but averring that in August, 1877, one Deschler, being then the owner of the lot described in the complaint, conveyed the same to Bissell by a deed of trust or mortgage, to secure the payment of four coupon bonds, for \$1,000 each, payable in ten years from date, with interest semi-annually, and all to become due at the option of any holder upon default being made for thirty days in the payment of any instalment of interest; that said deed of trust also contained a provision that in case of any such default in the payment of the interest, the said Bissell might enter upon the lot conveyed by it and retain possession

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thereof, receive the rents, issues and profits arising therefrom, and sell and convey the same, or any part of it, to pay the bonds secured by such deed of trust, or any interest due thereon; that immediately after the execution of the deed of trust the bonds were negotiated and sold to persons whose names were unknown, and who were and still are non-residents of this State; that afterwards, at the January term, 1879, of the superior court of Marion county, Deschler having made default in some of the conditions of the deed of trust, judgment was rendered against him for the full amount of the bonds and the interest then due thereon, at the suit of Bissell, as trustee under the deed, and a decree of foreclosure entered, ordering a sale of the lot for the payment of the judgment; that afterwards, on the 19th day of July, 1879, the said Bissell became the purchaser of the lot in his own name at a sheriff's sale under the decree of foreclosure, bidding therefor the aggregate amount of principal, interest and costs then due on the judgment; that one year thereafter the lot not having been in the meantime redeemed by any one, the said Bissell received a sheriff's deed therefor in consummation of his purchase under the decree of foreclosure, and had ever since been in the possession and control of the same; that at the time of his purchase of the lot at sheriff's sale, the said Bissell was not a resident of this State, but was then, and had ever since continued to be, a resident of the State of Connecticut, having in consequence no power to act as trustee of the owners and holders of the bonds, for whose use the decree of foreclosure was entered; that he, the said Rinker, refused to accept the deed tendered to him by Bissell, because it was not also executed by the owners and holders of the bonds lastly above named.

The court sustained a demurrer to this answer for alleged insufficiency of the facts set up as a defence, and, Rinker failing to answer further, a specific performance of the contract for the sale of the lot was decreed, and final judgment was rendered against Rinker for the purchase-money.

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Rinker v. Bissell, Trustee.

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Rinker assigns error upon the decision of the circuit court sustaining the demurrer to his answer, and argues: *First*. That the purchase of the lot by Bissell at the sheriff's sale, as trustee, was void, because of the inhibition against non-resident trustees in certain cases contained in the act of March 29th, 1879. *Secondly*. That his purchase in his own name was voidable on account of his former trust relations to the lot, and especially when considered in connection with his failure to make the owners and holders of the bonds named in the deed of trust parties to the foreclosure proceedings, and hence that it was necessary that these owners and holders should have united with Bissell in the execution of the deed, tendered before the commencement of the action, to make the title to the lot a complete and marketable one, as was legally contemplated by the contract of sale.

The act of March 29th, 1879, which went into effect on the 31st day of May, in that year, provides "That after the taking effect of this act, it shall be unlawful for any person, association or corporation to nominate or appoint any person a trustee in any deed, mortgage or other instrument in writing, except wills, for any purpose whatever, who shall not be at the time a *bona fide* resident of the State of Indiana; and it shall be unlawful for any person, who is not a *bona fide* resident of the State, to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the State, then his rights, powers and duties, as such trustee, shall cease, and the proper court shall appoint his successor, pursuant to the provisions of the act to which this is supplemental." Acts 1879, p. 225; R. S. 1881, section 2988.

It was held in the case of *Thompson v. Edwards*, 85 Ind. 414, that this act was not intended to have, and could not be construed as having, any retrospective effect. See, also, *Knapp v. Railroad Co.*, 20 Wal. 117. Bissell was, therefore, still trustee under the trust deed at the time of the sheriff's sale in July, 1879, and by his purchase of the lot at that sale he

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Rinker v. Bissell, Trustee.

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was by operation of law continued in his former position as such trustee.

As will be observed, the inhibition against the appointment of non-resident persons as trustees extends only to such appointments as are made by some deed, mortgage, or other instrument in writing, and hence has no application to cases in which persons become, or are continued, as trustees by operation of law merely. After his purchase at sheriff's sale, the trust relations of Bissell to the lot continued the same as they were before the foreclosure, except that Deschler's equity of redemption had been barred and foreclosed, and Bissell's power of alienation had become absolute and complete.

Bissell had as much right to purchase the legal title of the lot, when the sheriff sold it, as had any other plaintiff to buy the property of a judgment defendant at a like sale, and it was his duty to bid in the lot, if such a course were necessary to protect the trust estate in his hands. No charge of bad faith is made against Bissell in that respect, and all the presumptions are indulged in favor of the good faith and validity of his purchase.

The Code of 1852, which was in force when the foreclosure proceedings and sheriff's sale occurred, contained a provision that "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." 2 R. S. 1876, p. 34, section 4; R. S. 1881, section 252.

The deed from Deschler to Bissell made the latter a trustee of an express trust. The *cestuis que trust* were consequently not necessary parties to the proceedings to foreclose the implied mortgage created by the deed. *Musselman v. Cravens*, 47 Ind. 1; *Wolcott v. Standley*, 62 Ind. 198. In this class of cases, the trustee becomes the legal representa-

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tive of the *cestuis que trust*, and is charged with the responsibility of all litigation which arises in the enforcement of the trust. It is, therefore, proper that he should be permitted to control such litigation as affects the trust property. *Knapp v. Railroad Co., supra.*

Upon the facts averred in the answer, we see no objection to the sufficiency of the deed tendered by Bissell to Rinker, and nothing has been presented which, in our opinion, requires a reversal of the judgment.

The judgment is affirmed, with costs.

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No. 10,275.

THE BALTIMORE, OHIO AND CHICAGO RAILROAD COMPANY  
v. KREIGER.

PLEADING.—*Sufficiency of Complaint.—Defective Allegations of Fact.—Failure to Object Below.—Defects Cured by Verdict.—Supreme Court.*—Where the sufficiency of the complaint, or of any of its averments, is not called in question in the trial court, either by demurrer or by motion, and the complaint, though defective in some of its averments, states facts sufficient to render the judgment thereon a bar to another suit for the same cause of action, such defects are cured by the verdict, and can not be made available for the reversal of the judgment by an assignment of error, in the Supreme Court, that the complaint does not state facts sufficient to constitute a cause of action.

RAILROAD TRACKS.—*Secure Fences.—Animals Killed or Injured.—Private Way.*—Under section 4025, R. S. 1881, a railroad corporation is liable for stock killed or injured by its locomotives, cars or other carriages run on its road, unless it be shown that the road was securely fenced in, and the fence properly maintained, by the company or other person running the same, at the point where the stock entered upon the road; and the fact that the stock entered upon the road through an open gate at a private crossing will not exempt the corporation or other person from such liability.

From the Porter Circuit Court.

*H. Newbegin, B. B. Kingsbury, A. L. Jones, M. L. De Motte,*  
for appellant.

*W. Johnston,* for appellee.

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The Baltimore, Ohio and Chicago Railroad Company v. Kreiger.

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Howk, J.—This was a suit by the appellee to recover the value of two mare colts which were run over and killed by the appellant's locomotive, and where its road was not securely fenced. The cause was put at issue and tried by the court, and, at appellant's request, the court found the facts specially, and stated its conclusion of law thereon, in substance, as follows:

*"First.* That the plaintiff was, in November, 1880, the owner of two colts, of the value of \$120.

*"Second.* That, at said time, the defendant owned and operated a railroad in Porter county, Indiana, and through the lands of one Miller; that defendant permitted said Miller to maintain a private crossing over its right of way and track to enable him the better to pass from his tracts of land adjoining on either side thereof; that the right of way and track of the defendant was securely fenced, except at the point where said private crossing was maintained, at which place substantial gates were erected.

*"Third.* That the plaintiff is the owner of land adjoining the land of Miller, and between them they maintained a partition fence in fair condition and about four feet in height, through which partition fence the colts escaped from plaintiff's fields to the land of said Miller, without fault or negligence on the part of the plaintiff, and from the land of Miller to the railroad track of the defendant, through the gate at said private crossing, which at the time had negligently been left open by Miller, and that then and there the colts were killed by defendant's train of cars; that the land of Miller, over which the colts passed, was fenced on three sides, and a portion thereof cultivated, and one side was unfenced and open to the public commons."

As a conclusion of law, "The court concludes that, as against the plaintiff, the road of the defendant ought to have been securely fenced, but was not, and that the defendant is liable for the value of said animals, and plaintiff should have judgment therefor."

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The Baltimore, Ohio and Chicago Railroad Company v. Kreiger.

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Over the appellant's exception to its conclusion of law, the court rendered judgment for the appellee.

In this court the appellant has assigned errors as follows :

1. The complaint does not state facts sufficient to constitute a cause of action ; and,
2. The court erred in its conclusion of law.

Of the first error the appellant's counsel say : "The gist of the action, and the only part of the complaint upon which evidence seems to have been adduced, is as follows : 'That, at a place where by law the defendant was compelled to fence its railroad, but which was not done, and a gate was left open so that the colts could and did enter upon the railroad without hindrance, the same not being on station-grounds or at any crossing,' there being a statement that they were killed by a train of cars on defendant's road. This is the particular statement of the insufficiency of the fence, and we submit it is not a sufficient statement, within the meaning of the decisions of this court." This is the only objection to the complaint pointed out by counsel, and it is made for the first time in this court. The objection comes too late, even if it were well taken. After judgment and on appeal, it must be held that defective allegations of fact are cured by the finding or verdict. *Donellan v. Hardy*, 57 Ind. 393 ; *Smith v. Freeman*, 71 Ind. 85 ; *Cox v. Albert*, 78 Ind. 241.

Under the second error, it is insisted that the court erred in its conclusion of law, because the court had found as facts that appellant's right of way and track were securely fenced, except at the point where the private crossing was maintained, at which place substantial gates were erected. In discussing this point the appellant's counsel say : "Now, there is no finding that the gate was out of repair, but the court finds that this 'substantial gate' had been negligently left open by Miller, whose land the road at this point abutted, and for whose convenience this gate seems to have been made. There is no finding as to the time during which the gate was

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left open, nor is there any finding that the defendant had any notice of this fact, and the presumption must then be that the gate was left open without any knowledge on the part of the defendant; and we submit that there is no sufficient finding of facts going to show that the defendant was guilty of any negligence in allowing this deficiency in its fence to remain after notice of such deficiency." In support of their position and argument counsel cite the case of *Indianapolis, etc., R. R. Co. v. Adkins*, 23 Ind. 340; but they admit that the doctrine of the case cited was doubted by this court in the more recent case of *Cincinnati, etc., R. R. Co. v. Ridge*, 54 Ind. 39. We think that the case relied upon by counsel is more than doubted, in effect at least, in the later case, and it must now be regarded as overruled by the doctrine enunciated in *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194. Under the statute of this State and the decisions of this court, the true rule is this: Whenever and wherever a railroad company can fence in its road without injury or obstruction to its own business and to public rights or easements, it must securely fence in its road, or it must be held liable in damages for any and all animals killed or injured, for the want of such fence, by its locomotive or cars upon the line of its railroad. Thus, in *Indiana, etc., R. W. Co. v. Leamon*, 18 Ind. 173, it was held that if stock is killed by a railroad company, at a mere private road crossing, which was not securely fenced by the company, but which the company might lawfully have fenced, it will be liable under the statute for the value of the stock. Section 4025, R. S. 1881.

So, also, in *Indianapolis, etc., R. W. Co. v. Thomas, supra*, the court said: "A private way is not one in which the public have an interest, and closing it by a fence or gate can affect only the person to whom it belongs. We are unable to see any principle upon which railroad corporations can be absolved from the duty to fence such a way. If they are relieved from fencing any private way, where can any line be

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Whitcomb v. Miller.

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drawn? for there are many kinds of private ways, differing in size and character, but all agreeing in the one particular, that in them the public have no interest." *Indianapolis, etc., R. R. Co. v. Lowe*, 29 Ind. 545; section 4031, R. S. 1881.

In the case at bar, we are of opinion, that upon the facts specially found the court did not err in its conclusion of law.

The judgment is affirmed, with costs.

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No. 10,980.

#### WHITCOMB v. MILLER.

**PROMISSORY NOTE.**—*Principal and Surety.*—*Agreement.*—*Delivery.*—Where a promissory note, perfect on its face, containing no indications that it is delivered in violation of an agreement, is taken in good faith, and for a valuable consideration, the taker will not be affected by any agreement made between the principal and the surety of which he has no notice.

**SAME.**—*Pleading.*—*Answer.*—An answer by a surety on a promissory note, that the principal had delivered it in violation of an agreement, made between them, that the latter would procure an additional surety, but not alleging notice of such agreement by the payee, is insufficient on demurrer.

From the Shelby Circuit Court.

*T. B. Adams, L. T. Michener and G. M. Wright*, for appellant.  
*E. P. Ferris, J. S. Ferris and W. W. Spencer*, for appellee.

**ELLIOTT, J.**—The first paragraph of appellant's answer alleges that the note sued on was executed by him as surety for Will C. Nichols, as the appellee knew; that prior to the time of the delivery of the note appellee had agreed with Nichols that he should execute his note with appellant and John Elliott as sureties; that pursuant to this agreement Nichols presented the note sued on to appellant and informed him of the agreement with the appellee; that relying upon the agreement between appellee and Nichols that Elliott should sign, the appellant signed it; that Nichols afterwards took

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Whitcomb v. Miller.

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the note to the appellee, who, at first, objected, because it was not signed by Elliott, but finally agreed to and did receive it.

It is settled law that where a note is perfect on its face and contains no indications that it is delivered in violation of an agreement, and it is taken in good faith and for a valuable consideration, the taker will not be affected by any agreement made between the principal and the surety, of which he has no notice. *Deardorff v. Foresman*, 24 Ind. 481; *Bobbitt v. Shryer*, 70 Ind. 513; *Helms v. Wayne, etc., Co.*, 73 Ind. 325 (38 Am. R. 147). In this case the note was perfect in all respects, and there was nothing to indicate that the contract which the surety had placed in possession of the principal was not complete in every particular. It is contended that the averment that there was an agreement between the appellee and Nichols that Elliott and the appellant should both sign as sureties is sufficient to charge appellee with notice. We think otherwise. The essential thing in such a case as this is knowledge on the part of the taker of the note that the principal had delivered the note in violation of an agreement with the surety, and there is here no averment of knowledge or notice. In order to make a good answer, it is necessary to aver that the taker of the note had notice that the principal had made an agreement with the surety, and that he delivered the note in violation of it. This essential requisite should not be left to mere inference or conjecture, but should be positively and directly averred. It was immaterial what preliminary agreement had been made between Nichols and the appellee; the material question is: Was there an agreement between Nichols and the appellee, was the note delivered in violation of this agreement, and did the appellee have notice of that fact? The fact that Elliott's signature was not on the note does not prove that the appellee knew of the agreement between Nichols and his surety. The absence of Elliott's name could not, of itself, have justified the inference of an agreement between principal and surety and its violation, even if

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Plummer v. Farmers Bank of Mooresville.

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the question arose on the evidence, where much latitude of inference is allowable; much less so, then, where the question arises on the pleading, where the rule is that facts, and not evidence, must be pleaded, and pleaded by direct and positive averment.

We think that there is no material difference between the first and third paragraphs of the answer, and in ruling upon the former we have disposed of the latter.

Pleadings are to be construed according to their general tenor and scope. Mere isolated expressions or general conclusions can not have a controlling effect. The conclusion following the allegations of the third paragraph, that the note is not the defendant's act and deed, can not control the specific statements of fact.

Judgment affirmed.

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No. 10,930.

PLUMMER v. FARMERS BANK OF MOORESVILLE.

**ESTOPPEL.**—*Promissory Note.*—*Assignor and Assignee.*—*Defence.*—If the maker of a promissory note knows that another person is about to purchase it, and he informs such person, upon enquiry, that he has no defence and will pay the note, and such person purchases the same upon the faith of such promise, such maker is estopped to assert any defence against such purchaser, though he was ignorant of his defence at the time his promise was made.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

G. W. Grubbs and M. H. Parks, for appellee.

BEST, C.—This action was brought against the appellant upon a note of \$1,000, executed by him to George F. Bridges, who endorsed it to the appellee.

The appellant answered, alleging that the note was given for real estate conveyed to him by the payee by warranty deed,

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and that he had been compelled to pay \$107 taxes and \$48 interest upon a mortgage, which were then liens upon the land. These sums he sought to deduct from the amount due upon the note.

The appellee replied that before purchasing the note its agent called upon the appellant, informed him that it was about to purchase the same, and enquired of him whether the note was valid, and whether there were any defences to it; whereupon the appellant informed it that the note "was all right; that he had no defences to the same, and that he would pay it off in a few days thereafter;" that, relying upon such statements, and believing them to be true, without any knowledge that any defence existed to said note, the appellee, for value, purchased the same. Wherefore, etc.

A demurrer to the reply was overruled, the cause tried, and, over a motion for a new trial, judgment was rendered for the appellee. These rulings are assigned as error.

The appellant insists that the reply was bad, because it is not averred that he knew of his defence at the time his statements were made. He maintains that a party is not estopped, by his statement that he has no defence, to assert a defence of which he was ignorant when his statement was made, and hence the reply, to be sufficient, should aver that he knew of such defence at that time.

Without holding that such is or is not the rule of law, we will merely say that the case assumed is not the case made by the reply. The reply avers that the appellant, upon being informed that the appellee was about to purchase the note, and in answer to an enquiry as to defences, stated, not only that he had no defences, but that he would pay the note in a few days. This statement was a promise to pay the note, and it is well settled by authority that such promise estops the party making it from asserting any defence to such note against an assignee who purchased the same upon the faith of such promise, whether the party was or was not ignorant of his defence at the time the promise was made. In many cases in

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this State it has been held, that where the maker of a note promises a person, who he knows is about to purchase it, to pay the note, and such person purchases upon the faith of such promise, the maker is estopped to question the validity of such note or assert any defence to it as against such purchaser. The following are among the cases in which this proposition has been held: *Powers v. Talbott*, 11 Ind. 1; *Rose v. Wallace*, 11 Ind. 112; *Wright v. Allen*, 16 Ind. 284; *Morrison v. Weaver*, 16 Ind. 344; *Vaughn v. Ferrall*, 57 Ind. 182. There may be other cases in which the same doctrine has been asserted. In the case last above cited, a precisely similar reply was held sufficient.

It is proper, however, to remark that it does not appear from any of these cases that the persons sought to be estopped were ignorant of their defences at the time their several promises were made, and it may be said that these cases do not decide the precise question here presented, but, as the language employed is broad enough to embrace all defences, we think they must be so regarded.

The case of *Sloan v. Richmond, etc., Co.*, 6 Blackf. 175, was an action by the assignee of a promissory note in which the maker alleged in defence that the note was procured by fraud. The assignee replied that before he purchased the note the maker promised him to pay it, and the maker rejoined that at the time he promised he was ignorant of his defence. Upon appeal, it was conceded that the rejoinder could not be supported, and the court held that the promise precluded the maker from asserting his defence. This case is directly in point.

In *Cloud v. Whiting*, 38 Ala. 57, the rule is thus stated: Where a "note is purchased by a third person on the faith of a promise by the maker to pay it, the latter is thereby estopped from setting up the invalidity of the note as between himself and the payee, whether on the ground of fraud in the original contract, not known to the maker at the time of such promise, or of subsequent failure of consideration; and will be compelled to pay the assignee at all events."

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Elliott v. Frakes.

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Several cases are cited to support this proposition, among which are the cases of *Powers v. Talbott* and *Rose v. Wallace*, above cited, from our own reports.

These cases fully establish the proposition that such promise, as is alleged, will estop the maker from asserting any defence to such note as against such assignee, whether known or not at the time the promise was made.

This conclusion is in entire harmony with the doctrine that where one, in ignorance of his rights, suffers another to invest in his property, such person is not thereby estopped from thereafter asserting such rights.

As to whether a different rule obtains where no promise is made, we express no opinion, as no such question is presented. The reply, for the reasons given, was sufficient, and the demurrer properly overruled.

The only ground for a new trial was the refusal of the court to permit the appellant to prove that he was ignorant of his defence at the time his promise was made. There was no error in this ruling, as has been shown, and as there is none in the record the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

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No. 10,303.

## ELLIOTT v. FRAKES.

CHAMPERTY.—*Conveyance.*—*Tenants in Common.*—*Adverse Possession.*—The possession of a tenant in common, claiming the whole by virtue of a conveyance of the whole to him by warranty deed, will not make champertous a conveyance by other tenants in common of their undivided shares.

SAME.—*Real Estate, Action to Recover.*—*Answer.*—In a suit for possession of lands, and to quiet title, the defendant answered that when the plaintiff took conveyance the defendant was in possession, under a deed of the premises, with full covenants, by virtue of which he was claiming the lands.

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*Held*, that the answer was bad for failure to aver that the defendant entered, believing in good faith that he had title.

**DECEDENTS' ESTATES.—Sale of Land by Administrator.—Widow's Right.**—A sale of the whole of a tract of land to make assets, by an administrator of a husband, in pursuance of an order of court, the same person being also administrator of the widow, who survived her husband, passes no title to the share which the widow took as such upon her husband's death.

From the Howard Circuit Court.

*J. C. Blacklidge* and *W. E. Blacklidge*, for appellant.

*M. Bell* and *W. C. Purdum*, for appellee.

**HAMMOND, J.**—Action by the appellant against the appellee to recover possession of, and to quiet her title, to one-sixth of eighty acres of land in Howard county.

The appellant's claim of title, as set out in her amended complaint, was derived by deed July 6th, 1876, from Isaac Sipe. Said Sipe derived his title to one-sixth of the land as a devisee of Elizabeth Sipe, who died testate February 19th, 1856. Said Elizabeth, at the time of her death, owned one-third of the eighty acres of land in controversy, as the widow of John Sipe, who died September 20th, 1854.

The appellant's demurrer to the third and fourth paragraphs of the appellee's answer was overruled. To this she excepted, and assigns the same as error in this court. In these paragraphs of answer, the appellee sought to avoid the conveyance from Isaac Sipe to the appellant, on the ground that the appellee, at the time of such conveyance, was in adverse possession under color and claim of title. His claim of title, as more particularly set forth in the third paragraph of his answer, was based upon a warranty deed for the whole eighty acres made to him by one Frederick Zilliox, in 1864. Said Zilliox purchased the land of the administrator of John Sipe, deceased, at an administrator's sale under an order of the proper court. The case has been in this court before. *Elliott v. Frakes*, 71 Ind. 412. On the return of the case to the court below, the appellant's co-plaintiff, Martin Sipe, in the amended complaint, disappeared from the record. It was held in the

reported case, that the third paragraph of the appellee's answer was insufficient, for the reason that the court, ordering the administrator of John Sipe to sell the eighty acres, had no power to order the sale of more than two-thirds of it, and hence that such sale did not convey the interest in the land claimed by the appellant, as the grantee of Isaac Sipe, who, by the widow's will, held the one-half interest, which, at the death of John Sipe, went to said widow. The third paragraph of the appellee's present answer is the same as his third paragraph of answer, as it appears in the reported case, except, as it now comes before us in the record, it contains the additional averment that at the time Isaac Sipe conveyed to the appellant, the appellee was in the exclusive possession of the land, claiming title under his deed from Zilliox, adverse to the title of the appellant's grantor, the said Isaac Sipe.

Until the law upon the subject of a grantee under one out of possession recovering against one holding adverse possession was changed by section 1073, R. S. 1881, it was held that the conveyance in such case was void as against the person having the adverse possession. But in *Patterson v. Nixon*, 79 Ind. 251, this court decided that this ancient rule of the common law did not apply to a conveyance of a tenant in common; that the possession of one tenant in common was, constructively, the possession of all; and that there could, therefore, be no such adverse possession by any such tenant as would render void the deed of his cotenant. The facts alleged in the appellant's amended complaint, and in the third paragraph of the appellee's answer, show that the appellant's grantor and the appellee, at the time of the conveyance under which the appellant claims title, were tenants in common. Under the decision in *Patterson v. Nixon*, *supra*, the conveyance by Isaac Sipe to the appellant was valid, not only between the parties thereto, but also as to the appellee, notwithstanding his claim of adverse possession.

The fourth paragraph of the appellee's answer was as follows:

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Elliott v. Frakes.

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"And for 4th paragraph and further answer to the plaintiff's complaint, the defendant says that the plaintiff is not the real party in interest; that as against the defendant no title was conveyed by Isaac Sipe to the plaintiff as alleged in the complaint, and that the said Isaac Sipe is the real party in interest; that at the time of said alleged conveyance, on the 6th of July, 1876, the plaintiff having no other right or title therein, the defendant was in the exclusive possession of said one-sixth of said land described in the complaint, under a warranty deed duly recorded, and claimed to be the owner thereof, and in right to the possession of the same as against the said Isaac Sipe, Mary Elliott, the plaintiff, and all the world."

This paragraph was insufficient. It does not state from whom the appellee received the warranty deed; whether the person who made it had or claimed any title, nor whether the appellee's claim of title under such deed was in good faith.

In *Moore v. Worley*, 24 Ind. 81, it is said: "To constitute a *possession adverse*, so as to bar a recovery, or to *avoid a deed* subsequently executed by the true owner, the party setting up the possession must, in making his entry upon the land, act *bona fide*. He must rely on his title; he must believe the land to be his, and that he has title thereto, although his title may not be rightful or valid."

The appellant's demurrer should have been sustained to the third and fourth paragraphs of the answer.

The appellee, in his cross assignment of errors, questions the rulings of the court below in overruling his demurrer to the appellant's amended complaint and in sustaining the appellant's demurrer to the second paragraph of his answer.

No objection is pointed out to the amended complaint, and none occurs to us. The demurrer thereto was properly overruled.

The second paragraph of the appellee's answer states facts showing that after the death of John Sipe, and also after the death of his widow, Henry A. Brouse was appointed administrator of the former and executor of the latter; that he

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filed, in the proper court, petitions to sell the real estate of each decedent, and, as the administrator of John Sipe, obtained an order of court to sell the whole of the eighty acres in controversy, and sold and conveyed the same, as such administrator, to Frederick Zilliox, who afterwards conveyed to the appellee.

The facts stated do not show a sale by Brouse, except as administrator of John Sipe. No sale is averred to have been made by him as executor of said Sipe's widow. There is nothing, therefore, in the paragraph of answer under consideration, showing that the appellee owns any of the interest in the land which was held by the widow at her death. The sale by Brouse, as administrator of John Sipe, did not, as was settled in the former decision of this case, convey the widow's interest in the land. The demurrer was properly sustained to the second paragraph of the answer.

Judgment reversed, with instructions to the court below to sustain the appellant's demurrer to the third and fourth paragraphs of the appellee's answer, and for further proceedings in accordance with this opinion.

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 No. 10,924.

## INGERMAN v. NOBLESVILLE TOWNSHIP.

**DRAINAGE—Constitutional Law.—Repair of Ditches.—Township Trustee.**—So much of section 4282, R. S. 1881, as requires the township trustee to keep public drains in repair, and to pay the expense thereof out of the funds of the township, is constitutional and valid. *Campbell v. Dwiggins*, 83 Ind. 473, and *Tyler v. State, ex rel.*, 83 Ind. 563, distinguished.

From the Hamilton Circuit Court.

*F. M. Trissal, C. D. Potter, G. W. Paul and J. E. Humphreys*, for appellant.

*A. F. Shirts, G. Shirts, W. R. Fertig, A. D. Thomas, P. S. Kennedy and S. C. Kennedy*, for appellee.

90	393
188	38
90	393
145	142
145	487
145	593
90	393
149	207
151	131
93	393
153	396
90	393
1168	579

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Ingerman v. Noblesville Township.

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NIBLACK, C. J.—Complaint by George W. Ingerman against Noblesville township of Hamilton county, averring that on the 13th day of April, 1882, one James Oldacre was duly elected, qualified and acting trustee of said township; that to pay the plaintiff for work performed by him in the year 1882, in cleaning out a ditch constructed under the drainage laws of this State, which improved a public highway of said township, the said Oldacre, as such trustee, issued to the plaintiff an order in writing, in words and figures as follows:

“TRUSTEE’S OFFICE FOR NOBLESVILLE TOWNSHIP,  
“HAMILTON COUNTY, IND., April 13, 1882.

“This certifies that there is due George W. Ingerman, from this township, two hundred dollars and — cents for cleaning out the Ingerman Ditch, payable as soon as there may be funds on hand.

JAMES OLDACRE,

“Trustee of Noblesville Tp.”

That on the 8th day of July, 1882, the plaintiff presented said order for payment, and the said Oldacre made an endorsement thereon, that it should thereafter draw interest at the rate of six per cent. per annum, because of its non-payment; that said order still remained unpaid.

The defendant demurred to the complaint for want of sufficient facts to constitute a cause of action, and its demurrer was sustained. Final judgment was thereupon rendered in favor of the defendant upon demurrer.

Counsel inform us that the demurrer to the complaint was sustained upon the alleged ground that section 4282 of the Revised Statutes of 1881, upon which the plaintiff below based his claim for a recovery, has been held to be unconstitutional and void by the cases of *Campbell v. Dwiggins*, 83 Ind. 473, and *Tyler v. State*, 83 Ind. 563, and that, in consequence, there was no valid law to support the claim made by the complaint against the township. Section 4282, above referred to, has reference to work and repairs on ditches and drains already constructed, and so much of it as is material

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Ingerman v. Noblesville Township.

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to this cause was as follows: "After the construction of any such work the township trustee of such township in which the same is, or any part thereof, shall keep the same, or such part thereof, in proper repair and free from obstructions, so as to answer its purpose, and pay for the same out of the general township fund; and to raise the necessary money to reimburse that fund, he shall apportion and assess the cost thereof upon the lands which will be benefited by such repairs or removal of obstructions, according to such benefits in his judgment. He shall make a statement of such assessment, and deliver the same to the auditor of the county, who shall put the same upon the succeeding tax-duplicate, and it shall be a lien upon the lands, and be collected in the same manner as State and county taxes." Further details then followed as to the manner in which such assessments were to be made in cases in which lands in more than one township were to be assessed.

This section contained two separate and distinct provisions:

The first was for the repair of ditches and drains already constructed, and the payment of whatever repairs might be necessary out of the general fund of the proper township.

The second, for the reimbursement of the general township fund for the expenditures which might be thus incurred by the assessment of taxes upon the lands directly benefited by such repairs.

It was only the validity of this second provision that was involved in the cases of *Campbell v. Dwiggins* and *Tyler v. State, supra*, and nothing was said in either of those which had, or ought to be construed as having any proper application to the validity or invalidity of the first provision as above stated. The reasons assigned for holding the provision then in question inoperative and void have no pertinency to the first or preceding provision, which conferred no unusual or extraordinary powers upon township trustees, and constituted of itself a complete and independent provision, not in conflict with any restriction imposed by the Constitution to which our attention has been in any manner directed. It is

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Ingerman v. Noblesville Township.

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one thing to make disbursements out of the general township fund supplied by taxes collected generally from the taxable property of the township, and quite another thing to make a special and specific assessment of taxes to reimburse that fund on account of such disbursements.

In the case of *Clark v. Ellis*, 2 Blackf. 8, in which a statute was held to be in some respects unconstitutional, and in other respects valid, the court said: "We have heretofore decided that a part of an act of Assembly being unconstitutional, does not affect a constitutional part of the same act relative to the same subject. That part which is unconstitutional, is considered as if stricken out of the act; and if enough remains to be intelligibly acted upon, it is considered as the law of the land." This rule of construction has been since approved by this court and may be regarded as an established rule in this State. *Maize v. State*, 4 Ind. 342; *State v. Newton*, 59 Ind. 173.

Our conclusion is that the first provision of the section under discussion was a valid and effectual provision for the purpose for which it was ostensibly enacted, and obligatory upon all township trustees in whose townships ditches and drains had been constructed.

No inconvenience or injustice will probably result from the conclusion we have reached, since the section called in question in this case has been amended and re-enacted, with a view of curing the defects held to exist in it by the cases of *Campbell v. Dwiggins* and *Tyler v. State*, *supra*. Acts 1883, p. 173, section 7.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

ON PETITION FOR A REHEARING.

NIBLACK, C. J.—The argument submitted in support of the petition for a rehearing in this case does not controvert the general legal propositions announced in the foregoing

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Ingerman v. Noblesville Township.

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opinion. It is only contended that those general propositions are not applicable to the facts presented in this case; that the application we have made of those propositions is in manifest opposition to the intention of the Legislature in enacting the section of the statute held to be valid in some respects and invalid in others, and is, in its practical effect, new legislation and not judicial construction.

The controlling object which the Legislature evidently had in view in the enactment of the section was the keeping in repair a class of ditches and drains which had been constructed by a system of taxation and upon the theory that they were in some one of several ways promotive of the public interest. R. S. 1881, section 4274. The proper township trustee, as a public officer, was required to use the general township fund in making, or causing to be made, the necessary repairs.

We thought at the former hearing, and, upon further consideration, still think, that so much of the section as enjoined this public duty upon the several township trustees of the State was separate and distinct from, and complete without, the provision which followed for the reimbursement of the general township fund, and might be enforced notwithstanding the invalidity of the provision for reimbursement.

If the act of March 8th, 1883, does not make adequate provision for the reimbursement of the townships on account of repairs on ditches and drains, it is still within the power of the Legislature to supply the omission, and we assume that it will do so. *State v. Newton*, 59 Ind. 173; *Cooley Const. Lim.* 177.

The petition for a rehearing is overruled.

Howk, J., dissents.

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Holliday *et al.* v. Thomas *et al.*


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No. 10,291.

## HOLLIDAY ET AL. v. THOMAS ET AL.

90	398
128	398
90	398
142	415
90	398
161	295

**PAYMENT.—*Judgment.—Complaint to Satisfy.***—An averment that plaintiff, on, etc., fully paid off said judgment and costs, and the defendant thereupon promised to satisfy the same, in a complaint to enter satisfaction of a judgment in favor of the defendant against the plaintiff, shows payment to the judgment plaintiff.

**SAME.—*Attorney and Client.***—An attorney who takes a judgment can not, without special authority, bind his client by receiving as collateral security, and agreeing to collect, a claim against a third person; but if he does collect it and retains enough to satisfy the judgment, and promises to do so, such retention is payment, and binds the judgment plaintiff.

**HARMLESS ERROR.—*Evidence.***—The admission of improper evidence which only tends to prove a fact otherwise clearly shown by competent evidence, which is not controverted, is a harmless error.

**ASSIGNMENT OF ERROR.—*Demurrer.***—Where separate demurrers are overruled to two paragraphs of complaint, an assignment of error that “the court erred in overruling the demurrer to the first and second paragraphs of the complaint,” is sufficient to present to the consideration of the Supreme Court the separate ruling upon each demurrer.

From the Hancock Circuit Court.

*S. A. Wray* and *J. H. Mellett*, for appellants.

*J. A. New* and *J. W. Jones*, for appellees.

**MORRIS, C.**—The appellees sued the appellants for the purpose of having a certain judgment declared satisfied. The complaint consists of two paragraphs.

The first states that William J. Holliday, John W. Murphy and John A. Furgason, on the 16th day of March, 1875, recovered a judgment in the Hancock Circuit Court against the appellees, William O. Thomas and Austin K. Spencer, for the sum of \$198.44 and costs amounting to \$9.95; that on or about the 13th day of March, 1876, the appellees fully paid off said judgment and costs, and that the appellants thereupon promised and agreed to satisfy and discharge of record the said judgment. It is also averred that said judgment constitutes a lien and cloud upon the title of certain lands owned at the time by the appellee Thomas, in said county;

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*Holliday et al. v. Thomas et al.*

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that the appellants have been often requested, but have refused, to satisfy said judgment, and now claim that the same is unpaid, and threaten to collect it. Prayer that the judgment be declared satisfied and for other proper relief.

The second paragraph states the recovery of a judgment as stated in the first paragraph, but alleges that one Henry A. Swope was the attorney of the appellants, who obtained and took for them said judgment, and that he was the only attorney of record for them in the cause in which said judgment was recovered; that afterwards the appellees placed in the hands of the said Swope, the attorney of the appellants as aforesaid, a promissory note, executed by one Pauley, and others, as collateral security for the payment of said judgment, which called for about \$400, and which said Swope accepted as such security; that said note was collected by said Swope and the amount of the appellants' said judgment was deducted from the amount so collected by him on said note delivered to him as aforesaid by the appellees, said Swope still being and acting as the attorney of the appellants in the collection of said judgment recovered by them against the appellees, and that, as such, upon the receipt of said money, he promised to satisfy said judgment of record; that shortly after the receipt of said money the said Swope died, and that the appellees did not know that said judgment was not satisfied until they were so informed by their attorney. It is alleged that the appellee Thomas owns land in said county upon which said judgment constitutes an apparent lien, etc., and casts a cloud upon his title, etc. Prayer the same as in the first paragraph.

The appellants demurred separately to each paragraph of the complaint. The court overruled the demurrers.

The appellants then answered by a general denial.

The cause was submitted to the court for trial. The court found in favor of the appellees, as to the sum of \$174.50; that that amount had been paid by them on said judgment. The court also found for the appellants as to the balance of

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Holliday *et al.* v. Thomas *et al.*

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said judgment. The appellants moved for a new trial. The motion was overruled, and the court adjudged that said judgment of the appellants, as to the sum of \$174.50, be satisfied as of April 12th, 1876.

The assignment of errors is as follows:

1. The court erred in overruling the demurrer to the first and second paragraphs of the complaint.
2. The court erred in overruling the appellants' motion for a new trial.
3. In overruling the motion of the appellants to change and modify the finding and judgment of the court.

The last error is not discussed by the appellants' counsel, and will be regarded as waived.

The appellees insist that the demurrer was filed to the original complaint in the cause, and not to that which appears in the record. In this the appellees are mistaken. The amended complaint, that which appears in the record, was filed on the 7th of June, 1881, and the demurrer was filed on the following day.

The appellees also contend that under the first error assigned it must appear that both paragraphs of the complaint are bad in order to reverse the judgment.

We do not think so. We think the proper construction of the language used in the assignment of the first error is, that the court erred in overruling the demurrer to the first paragraph of the complaint, and also in overruling the demurrer to the second.

The objection to the first paragraph of the complaint is that it does not state to whom the payment was made, whether to the appellants or any one authorized to receive payment. It does aver, that on or about the 13th day of April, 1876, the appellees fully paid off said judgment and costs, and that the appellants promised to satisfy the same of record. This was equivalent to an allegation of payment to the appellants, and entirely sufficient to withstand a demurrer. If there was any doubt as to whom the payment was alleged to have been

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Holliday *et al.* v. Thomas *et al.*

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made, a motion to make the paragraph more certain in that respect would have removed it. The court did not err in overruling the demurrer to the first paragraph of the complaint.

It is objected to the second paragraph of the complaint, that Swope, the attorney who obtained the judgment for the appellants against the appellees, had no authority, as their attorney, to accept the \$400 note as collateral security or otherwise, and that, in its collection and in the retention of the money collected upon it, he must be regarded, upon the facts stated, as the attorney of the appellees, and not as the attorney of the appellants. It is not alleged that Swope had any special authority to accept from the appellees said \$400 note as collateral security for the payment of the appellants' judgment. He could not do so by virtue of his general employment to collect the debt for which he obtained said judgment. By his general employment, he was authorized to collect the judgment by the usual means in money. He could not make any compromise in relation to it or discharge it otherwise than by the receipt of money. In collecting the \$400 note he must be regarded as the attorney of the appellees, and not as the attorney of the appellants. *Miller v. Edmonston*, 8 Blackf. 291; *Jones v. Ransom*, 3 Ind. 327; *Corning v. Strong*, 1 Ind. 329; *Russell v. Drummond*, 6 Ind. 216; *O'Conner v. Arnold*, 53 Ind. 203.

But it is averred in the second paragraph, that Swope did collect the money on the \$400 note; that after he had collected it, and when he had it in his hands, and while he was still acting as the attorney of the appellants in collecting said judgment for them, he deducted the amount of the appellants' judgment from the money collected on the \$400 note, and that, upon the receipt or retention of it, he agreed to satisfy said judgment of record. This averment is equivalent to a direct allegation that in retaining the amount of the appellants' judgment out of the money which he had collected for the appellees, he was acting as the attorney of the appellants, and not as the attorney of the appellees. In thus retaining the money

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Holliday *et al.* v. Thomas *et al.*

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of the appellees for the payment of the appellants' judgment, Swope was accomplishing the very thing for which the appellants had employed him, and acting within the scope of his authority as their attorney. The retention of the money and his promise to satisfy the judgment showed that he was acting for the appellants, not for the appellees. As the attorney of the appellants he had, upon getting the money, authority to do that which he agreed to do; as the attorney of the appellees, he had no such power. We think the court did not err in overruling the demurrer to the second paragraph of the complaint.

The appellants also contend that the finding of the court is not sustained by sufficient evidence. The evidence is conflicting. The testimony of the appellees, aside from that produced by the appellants, abundantly justified the finding of the court. The testimony produced by the appellants, if believed, would have entitled them to a finding in their favor. It was for the court below to weigh the evidence. This court can not do this. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

Upon the trial the appellees were permitted to prove, over the objection of the appellants, certain statements made by Swope in relation to the collection of the note placed in his hands by the appellees. The appellants insist that in the admission of this testimony the court below erred. Grant this, though we do not decide it, the error can not avail the appellants. It was proved by other uncontradicted witnesses that Swope had collected and received the money on the note given him by the appellees. Thomas, one of the appellees, swears to it, and so does one of the makers of the note, and, as to this, they are not contradicted by any witness. If, therefore, the court erred in admitting proof of what Swope had said about it, the error must be deemed to be harmless.

We think there is no available error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

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Kincaid *et al.* v. Nicely *et al.*

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No. 10,863.

## KINCAID ET AL. v. NICELY ET AL.

**DEMURRER TO EVIDENCE.**—*Practice.*—Where, upon a demurrer to evidence, there is evidence tending to sustain the party having the burden of the issue, the demurrer should be overruled, and, if no such evidence, sustained.

From the Boone Circuit Court.

*F. M. Charlton, T. W. Lockhart and C. S. Wesner*, for appellants.

*W. B. Walls*, for appellees.

**BLACK, C.**—In an action to which the appellants and the appellees were parties, the appellees filed a cross complaint against the appellants, to which the appellants answered by general denials. The record shows that “to try the issue herein joined on the cross complaint,” the same was submitted to a jury. The jury having heard the evidence of the cross complainants, the defendants to the cross complaint demurred to the evidence. The jury was discharged, the demurrer was filed, and the appellees, without objection, joined in the demurrer. The court overruled the demurrer, and rendered judgment for the appellees as prayed in the cross complaint.

The only question argued by counsel is whether the evidence was sufficient, on demurrer thereto, to sustain the allegation of the cross complaint, that the grantor in a certain deed of conveyance of real estate was of unsound mind when he executed it. There was some evidence tending, though perhaps slightly, to prove the grantor’s temporary unsoundness of mind. When this can be said, it must also be said that it was not error to overrule the demurrer. On demurrer to evidence, the court must look to see whether there is any evidence tending to sustain the party having the burden. If there is no such evidence, the demurrer should be sustained; but if there is any such evidence it can not be weighed as evidence is weighed by a jury. No question concerning the

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Loy v. Loy, by Next Friend.

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credibility of the witnesses can be entertained, nor can any portion of the evidence of a contrary tendency be considered and permitted to outweigh the evidence, the tendency of which is against the demurring party.

It is not improbable that a jury would have decided against the appellees, but the court was not acting as a jury, but was acting only as a court. Its province was to apply the law to admitted facts, to decide against the appellees if there was no evidence tending to sustain the material averments of the cross complaint; to decide in their favor if there was any evidence of such a tendency. If it was allowable to a jury to decide in favor of the appellees, it was the duty of the court to do so. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

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No. 10,608.

### LOY v. LOY, BY NEXT FRIEND.

BILL OF EXCEPTIONS.—*Filing.—When Part of Record.—Supreme Court.*—

Under section 629, R. S. 1881, a bill of exceptions, when filed, becomes a part of the record, and, unless the transcript shows, in some manner, the filing of the bill, it can not be considered in the Supreme Court as constituting a part of the record.

From the Putnam Circuit Court.

*D. E. Williamson* and *A. Daggy*, for appellant.

*J. V. Hadley*, *E. G. Hogate* and *R. B. Blake*, for appellee.

Howk, J.—The only error assigned by the appellant on the record of this cause is the overruling of his motion for a new trial. In this motion the only causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law. Manifestly, these causes for a new trial will present no question

90	404
128	226
90	404
128	537
90	404
124	7
90	404
128	505
90	404
140	545
142	226
112	679
143	385
143	448
90	404
147	512
147	518
90	404
148	183
90	404
157	210

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Loy v. Loy, by Next Friend.

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for the decision of this court, if it can be correctly said, as the appellee's counsel claim, that the evidence is not in the record.

It is shown by the record that the cause was tried and judgment rendered on the 18th day of May, 1882; and that, on the same day, the appellant was granted an appeal to this court, "and sixty days herefrom are given the parties to file bills of exceptions herein." There is copied into the record a writing purporting to be a bill of exceptions in this case, which writing concluded as follows:

"And the defendant now asks that this, his bill of exceptions, be signed, sealed and made part of the record in said cause, which is done this 15th day of July, 1882."

(Signed) "SILAS D. COFFEY."

The date of this signature shows that the writing was signed by the judge of the court before the expiration of the sixty days' given by the court for filing bills of exceptions. But the record wholly fails to show, in any manner, that this writing or bill of exceptions was filed in the court below, either within the time given, or, indeed, at any time. Appellee's counsel, therefore, insist that the writing or bill of exceptions is not shown to be, and is not, a part of the record, and can not be so regarded by this court in the consideration or decision of this cause.

It seems to us that this position is well taken and must be sustained. The statute provides that when the bill of exceptions is filed "it shall be a part of the record." Section 629, R. S. 1881. Where time is given beyond the term in which to file a bill of exceptions, and it appears that the bill was presented to and signed by the judge within the time limited, the record must show, in some manner, that the bill was filed, or it can not be considered in this court as constituting a part of the record of the cause.

We are of the opinion, therefore, that the bill of exceptions, purporting to contain the evidence on the trial of this case, is not shown to be and is not a part of the record. In

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The State v. Henderson.

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the absence of the evidence from the record, we can not say that the court erred in overruling appellant's motion for a new trial, for either of the causes assigned therein. The ruling of the trial court is presumed to be correct, and the record fails to show that it was erroneous. In such a case we are bound to conclude, as we do, that no error is shown to have been committed by the court in overruling appellant's motion for a new trial. *Myers v. Murphy*, 60 Ind. 282; *Bowen v. Polard*, 71 Ind. 177; *Dunn v. Hubble*, 81 Ind. 489.

The judgment is affirmed, with costs.

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No. 11,097.

## THE STATE v. HENDERSON.

CRIMINAL LAW.—*Indictment*.—*Perjury*.—Perjury can not be assigned upon the testimony of a witness, before a grand jury, that certain named persons "did not *unlawfully* sell intoxicating liquors to him," inasmuch as the opinion of the witness upon such a question of law is immaterial.

From the Morgan Circuit Court.

*F. T. Hord*, Attorney General, and *F. P. A. Phelps*, for the State.

*W. R. Harrison*, *W. E. McCord*, *G. W. Grubbs* and *M. H. Parks*, for appellee.

HAMMOND, J.—Indictment for perjury against the appellee. His motion to quash was sustained. The State excepted, and by a proper assignment of error in this court presents for our consideration the question of the sufficiency of the indictment.

The appellee, as charged in the indictment, was a person under the age of twenty-one years. He was, on November 21st, 1882, summoned before the grand jury as a witness and was duly sworn by the foreman.

The indictment then alleges: "And it then and there be-

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came a material matter, and was the point in question by and before and with said grand jury, as to whether or not James Quinn, John D. Calder and William Enochs, or either of them, or any other person or persons, had at said county of Morgan and State of Indiana, at any time within the two years next preceding the 21st day of November, 1882, unlawfully sold or given away any intoxicating liquors to him, the said William Henderson, and whether or not the said William Henderson was then and there a person under the age of twenty-one years for the two years preceding said 21st day of November, 1882; and the said William Henderson, upon his oath as aforesaid, \* \* \* \* did then and there swear and depose that he was a person under the age of twenty-one years, \* \* \* which evidence was then and there true. And said William Henderson, upon his oath as aforesaid, \* \* \* did then and there unlawfully, feloniously, wilfully, corruptly and falsely depose and swear that the said James Quinn, and the said John D. Calder, and the said William Enochs had not, nor either of them had, at any time within the two years next preceding said 21st day of November, 1882, unlawfully sold or given to him any intoxicating liquors whatsoever in the county of Morgan and State of Indiana, and that no other person or persons had, at any time within the two years next preceding said 21st day of November, 1882, unlawfully sold or given to him any intoxicating liquors at said county of Morgan and State of Indiana."

The indictment then charges the truth to be that the persons above named had, at various dates, which are given, in said county and State, within two years preceding November 21st, 1882, unlawfully sold and given intoxicating liquors to the appellee.

It will be observed that the indictment does not charge that the appellee, in his evidence before the grand jury, swore that the persons named and others had not sold or given him intoxicating liquors. He swore that they had not *unlawfully* sold or given him such liquors. All the sales and gifts set

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out in the indictment may have been made to him, and yet he would not be guilty of perjury so far as the facts were concerned. His guilt, if it existed as charged, may have arisen wholly out of his opinion of the legal effect of such sales and gifts. The most that is charged against him is that he feloniously, wilfully and corruptly swore that the sales and gifts of intoxicating liquors, alleged to have been made to him, were not unlawfully made.

We are of the opinion that it is not competent for the grand jury to take the opinion of a witness under oath as to the legal effect of facts about which he is required to testify. Such opinion is irrelevant and immaterial, and can not be made the basis for a charge of perjury. The appellee should not have been asked before the grand jury whether unlawful sales or gifts of intoxicating liquors had been made to him. The fact as to whether there had been sales or gifts of intoxicating liquors to him might have been elicited from his testimony, and it was then for the grand jury to say whether, from the facts stated, the sales and gifts, if any were testified to, were unlawful. Witnesses before the grand jury may be required to testify as to facts, and if they swear falsely as to these, they may be guilty of perjury. But their opinion of the law growing out of the facts, or their opinion whether a certain act was lawful or unlawful, should not be called for, and if called for and given, or offered voluntarily, a charge of perjury can not be predicated upon it. No doubt a jurist, called in a proper case to testify as to a foreign law, might be guilty of perjury, if he swore falsely, the same as a witness testifying as to a fact. But we hold that where a witness is called to testify solely in reference to facts, and where it is not a case calling for expert evidence as to questions of law, the witness can not be guilty of perjury in giving, voluntarily or otherwise, an opinion upon a point of law, or, what is the same thing, an opinion concerning the legal consequences of any admitted or disputed fact.

The case of *State v. Woolverton*, 8 Blackf. 452, is in point.

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The defendant in that case had, in a suit against him before a justice of the peace, filed a sworn plea to the effect that the title to lands was in controversy growing out of a deed referred to in the plea. For this he was indicted for perjury, the perjury charged being for falsely swearing that the title to lands was in controversy, whereas it was alleged, that such title was not in issue. It was said by this court in that case: "It will be observed that the existence of the deed of defeasance is not denied, and it is very clear to us that the assertions in the plea upon which the perjury is assigned, 'that the title of lands is in controversy,' and 'that the title to lands is in issue in this cause,' are but the mere opinions of Woolverton as to the legal effect of said deed of defeasance; and being so, they will not support an indictment for perjury." See, also, *Rex v. Crespigny*, 1 Esp. 280; *Commonwealth v. Brady*, 5 Gray, 78.

We are of opinion that the indictment in this case was not sufficient, and that the motion to quash was properly sustained. Judgment affirmed.

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No. 10,450.

## MOORE ET AL. v. NEWLAND.

**COSTS.—Amount of Recovery.—Statute Construed.—Case Criticised.**—In a suit for a money demand on contract, begun in the circuit court, the plaintiff recovered five dollars. There was no set-off, counter-claim, or payment pleaded, and nothing demanding affirmative relief for the defendant.

*Held*, under sections 590 and 591, R. S. 1881, that all costs should be taxed to the plaintiff, and what is said in *Bates v. Kuhn*, 12 Ind. 355, to the contrary, was not necessary to that case, and is in conflict with the statute and with several prior and subsequent cases.

From the Parke Circuit Court.

*S. D. Puett*, *A. F. White* and *E. Hunt*, for appellants.

*T. N. Rice* and *J. T. Johnston*, for appellee.

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FRANKLIN, C.—Appellants sued appellee for work and labor in the construction of a well, claiming \$118.75. The appellee answered in three paragraphs: 1st. A denial; 2d. A special contract, and non-compliance by appellants; 3d. A warranty, and breach of the warranty. Reply in denial. Trial by jury, and a verdict for \$5 for appellants. Over a motion for a new trial judgment was rendered on the verdict.

The errors assigned are the overruling of the motion for a new trial, and the sustaining of appellee's motion to tax the costs of the cause against the appellants. The first reason insisted upon for a new trial is, that the damages assessed by the jury are too small. Appellants in their brief contend that all the testimony of the plaintiffs, both in chief and rebuttal, places the value of the well at from \$100 to \$127; and all the witnesses for the defendant place the value of the well at nothing; that it was utterly valueless; and if the plaintiffs were entitled to recover anything, they were entitled to recover some sum not less than \$100, nor more than \$127; otherwise the verdict should have been for the defendant. Taking this statement of the evidence as true we can not tell, without weighing the evidence, whether the damages assessed are too small or too large; and as there is no complaint of the damages being too large we can not weigh the evidence in order to determine whether they are too small. In such cases, that duty devolved alone upon the court below. There is no available error in overruling the motion for a new trial on account of the damages being too small.

The second error assigned is the sustaining of appellee's motion to tax the costs against appellants. Appellants insist that the second and third paragraphs of appellee's answer were in the nature of set-offs and counter-claims, and that, their claim for damages being thereby reduced, they were entitled to recover costs. Under the special contract, as pleaded in the said second paragraph of answer, the appellee was to have sixty days after the well was completed to try and test it, and if it did not prove satisfactory as a stock well he was

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not to receive it, or pay any thing for it; and upon being tested it was unsatisfactory, and he never accepted it.

The breach of the warranty pleaded in the third paragraph of answer was upon the same contract.

We do not think these paragraphs of answer can be placed under the head of counter-claim or set-off. Neither of them claims anything due the defendant, or that he has sustained any damage connected with or growing out of the cause of action, in reduction of plaintiffs' claim. They are simply paragraphs of answer in bar of the plaintiffs' cause of action, and ask no affirmative relief for the defendant. R. S. 1881, section 350.

The 591st section of the R. S. 1881 reads as follows: "In actions for money demands on contract commenced in the circuit or superior courts, if the plaintiff recovers less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter-claim pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs. When the judgment is reduced below fifty dollars by proof of payments, the defendant shall recover costs."

Under this section, upon the motion of appellee, the costs were taxed against the plaintiffs; and it is insisted by appellants that they are not liable for costs in any case where the judgment is reduced below \$50, except where it has been so reduced by proof of payments. And in support thereof we have been referred to the case of *Bates v. Kuhn*, 12 Ind. 355, where the following language is used: "It is, therefore, evident that the plaintiff's judgment was not reduced below 50 dollars, by payments; and, it seems to us, that under a proper construction of the statute, the conclusion must be, that where the demand proved by the plaintiff is reduced below that sum by any legitimate defence other than that of payment, the defendant is liable to a judgment for costs."

In that case the claim was not reduced below \$50, and a set-off was specially pleaded. The language used in the opin-

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ion is much broader than was necessary to be used in deciding the question. The question here under consideration can hardly be considered as being decided in that case, but, if so considered, we do not find that that case has been cited or approved in any subsequent case in this court. And it does seem to us that the language there used is in conflict with the foregoing section of the statute. According to that construction, all defences, except payment, must be considered as counter-claims or set-offs, which is extending the meaning of these technical names of defences beyond what the authorities will warrant.

The 590th section of the R. S. 1881 provides: "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law."

The next section embraces the different provisions of law as applicable to actions for money demands, and makes a different general rule, and that is: "If the plaintiff recover less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter-claim pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs." By this provision whenever the plaintiff in an action for money demands recovers less than \$50 he shall pay costs. But then comes in the exception to this general rule, and that is, if the judgment, exclusive of costs, has been reduced below \$50 by a set-off or counter-claim pleaded and proved, he shall recover costs. In such cases, he can not recover costs where the judgment has been reduced below \$50 by any other defence than set-off or counter-claim, but must pay costs; and the statute only provides for the defendant recovering costs where the judgment has been reduced below \$50 by proof of payments.

The statute, literally construed, means that when the judgment has been reduced below \$50, exclusive of costs, by any defence not a set-off, counter-claim, or payment, neither party

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shall recover a judgment for costs, but that the plaintiff shall pay costs, which substantially means that judgment may be rendered against the plaintiff for the costs; and a motion to tax the costs against the plaintiff is the proper remedy.

In the case of *Brook v. Parker*, 5 Ind. 538, decided before the case of *Bates v. Kuhn*, *supra*, it was held in such cases, where no set-off or counter-claim was pleaded, the plaintiff was liable for costs, and could not recover costs.

The following subsequent cases follow the case of *Brook v. Parker*, *supra*, instead of the case of *Bates v. Kuhn*, *supra*: *Columbus, etc., R. R. Co. v. Watson*, 26 Ind. 50; *State, ex rel., v. Parker*, 33 Ind. 285; *Stevenson v. Ennis*, 39 Ind. 216.

In the paragraphs of answer under consideration, the defendant claimed nothing by way of set-off, counter-claim, payment, recoupment, or in any way, in mitigation of damages; they were pleaded in bar of the plaintiffs' right to recover anything upon their cause of action, and under which the plaintiffs recovered a judgment for less than \$50.

We think there is no error in sustaining appellee's motion to tax the costs against appellants.

There is no error in overruling the motion for a new trial, or in sustaining the motion to tax the costs against the plaintiffs.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

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No. 10,397.

YOUST v. HAYES.

**MARRIED WOMAN.—Deed.—Wife.—Inchoate Interest.—Judicial Sale.—Partition.**—A husband's lands were sold on execution to satisfy a personal judgment against him, and, not being redeemed, the purchaser took a sheriff's deed. During the year for redemption the husband and wife joined in a conveyance, with covenants, of the lands to H.

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*Held*, that H. was seized of an undivided one-third of the land, which would have vested in the wife by virtue of the statute, R. S. 1881, section 2508, and could maintain suit for partition.

From the Henry Circuit Court.

*T. B. Redding, W. Grose and M. E. Forkner*, for appellant.  
*J. H. Mellett and E. H. Bundy*, for appellee.

MORRIS, C.—The facts out of which the contention between the parties arises are thus stated by the appellant:

In February, 1878, Thomas J. Petty, whose wife was then and is still living, was the owner of the west half of the southwest quarter of section 7, township 13 north, of range 10 east, in Henry county, Indiana.

On the 25th day of February, 1878, a judgment was rendered against said Thomas J. Petty in favor of Thompson Sharpe, administrator, which became and was a lien upon said land. The land was sold upon an execution issued on said judgment, on the 23d day of November, 1878, by the sheriff of said county, to one Joseph Sharpe, who received a certificate of purchase therefor, which certificate he assigned to the appellant, and that said sheriff, after the time for redemption had expired, executed and delivered to the appellant, on the 26th day of January, 1880, a deed for said land; that Petty and wife, on the 23d day of January, 1879, two months after the sheriff's sale, conveyed by deed of warranty in the statutory form, said real estate to the appellee, Hayes; that on the 30th day of January, 1877, said Petty and wife executed a mortgage on said land to one Abraham Garr, securing certain notes therein described; that this mortgage was assigned to the Citizens State Bank of Newcastle, Indiana, and by the bank assigned to the appellee; that the appellee brought suit upon said mortgage and notes, and obtained thereon a decree of foreclosure, and sold and bought in said land upon said decree, and received a certificate of purchase therefor; that afterwards, on the 21st day of October, 1880, the appellant redeemed said land from the sale under said decree of fore-

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closure before the time for redemption had expired, by paying into the clerk's office of said court, for the appellee, the sum of his bid and all interest and costs allowed by law, amounting to \$2,980.

The court below held that, upon these facts, the appellee was the owner and entitled to the undivided one-third of said land as against the appellant, and ordered partition, etc.

The counsel for the appellant say: "Upon the above statement of facts, it is evident that if Hayes, the appellee, has any title to the real estate in controversy, it is derived through the wife of said Petty, by and through the deed aforesaid, and is that right, interest and title that the wife of said Petty had in and to said land, at and from the sale of said land by the sheriff on said judgment of Sharpe against Petty, as given to her by the statute of 1875. But we claim that the deed of herself and husband did not convey or pass any title or interest in said land, but extinguished her inchoate interest, and that Hayes took no title or interest by said deed."

The question thus stated is fairly presented by the record, and as it is the only one discussed by the appellant, no other question will be considered. *Merrick v. Leslie*, 62 Ind. 459; *English v. State, ex rel.*, 81 Ind. 455.

In considering the question thus presented, we need not refer to the mortgage mentioned in the record nor to the proceedings upon its foreclosure; neither the mortgage nor such proceedings in any way affect the question before us.

The appellant does not contend, at least not directly, that the deed executed by Petty and wife to the appellee, some two months after the sheriff's sale of the land in controversy to Joseph Sharpe, was not effectual to convey to him whatever interests his grantors then had in said land. We think such a deed as Petty and wife executed to the appellee would have that effect.

In order to determine the rights of the parties, it becomes necessary to ascertain what interest Petty and wife had in the real estate at the time they conveyed it to the appellee. Petty

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had, at the time, the right to the possession of said real estate until the expiration of the time allowed by law to redeem from the sale. He had, also, during that time, a right to redeem from the sale. These rights passed, by his deed, to the appellee. Petty's wife had an inchoate right to one-third of the land in fee, which, in case the land should be redeemed from the sheriff's sale, would be contingent upon her surviving him, but which would, in case the land should not be redeemed, become absolute in point of fact, at the expiration of the time allowed for redemption, and by relation, from the day of the sale. Her right in the land, at the time she and her husband conveyed to the appellee, was one-third of it if it should not be redeemed according to law. This right, by the law of 1875, grows out of the sale of the land upon execution. If there had been no sale, there could have been no such right; and, if there was no such right in existence, a deed executed by the husband and wife, for land which had not been sold at judicial sale, could not, as held in the case of *Hudson v. Evans*, 81 Ind. 596, pass such an interest.

If the deed of Petty and wife passed their respective interests in the land in controversy to the appellee he occupied, from the time of the execution of this deed, the same relation to the land that his grantors would have occupied had they not executed the deed. The land not having been redeemed from the sheriff's sale, Mrs. Petty could, had she not conveyed, have claimed one-third of the land in fee, as against the sheriff's grantee and those claiming under him. If her right to, and interest in, the land passed, by the deed of herself and husband, to the appellee, it follows that he was entitled to one-third of the land in controversy. We know of no reason why her interest should not be held to pass by her deed. The statute of 1875 was enacted for the benefit and protection of married women. It would be opposed to the spirit of the statute to hold that the wife could not, with the concurrence of her husband, sell and convey the interest thus secured to her.

The appellant contends that the deed of Petty and wife had

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the effect to extinguish her inchoate interest in the land and her right under the statute of 1875. We do not think so. The interest and right passed to her grantee by her deed, in which her husband joined, or it remained in her. If it passed to her grantee, the appellee was entitled to one-third of the land in controversy; if it did not, then the land not having been redeemed, she became entitled to one-third of it at the expiration of the time allowed by law for redemption, and the title thus subsequently acquired by her would enure through her deed to the appellee. *King v. Rea*, 56 Ind. 1, 17.

The view which we have taken of the question under consideration renders it altogether immaterial whether the interest of Mrs. Petty in the land became absolute, under the act of 1875, at the time the period for redemption expired, or whether it is to be deemed to have become absolute by relation on the day of sale. But see, upon this subject, *Hollenback v. Blackmore*, 70 Ind. 234; *Elliott v. Cale*, 80 Ind. 285. We think there is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

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 No. 10,505.

NYCE v. HAMILTON.

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INSANITY.—*Inquest of.—Guardianship.—Jurisdiction.—Notice.*—Where, in proceedings to ascertain one's insanity, with a view to guardianship, under sections 2545-2547, the subject is produced in court and is present during the trial, the proceedings being in all respects according to the statute, the court has jurisdiction, no other notice to him being necessary.

From the Decatur Circuit Court.

*W. A. Moore, B. F. Bennett, J. D. Miller and F. E. Gavin,*  
for appellant.

*C. Ewing, J. K. Ewing and C. Ewing, Jr.,* for appellee.

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ZOLLARS, J.—This proceeding was instituted under sections 2545, 2546 and 2547, R. S. 1881, to have the appellant declared a person of unsound mind, and a guardian appointed for him. On the 28th day of November, 1881, the following written statement by appellee was filed in the court below, viz. :  
“STATE OF INDIANA, COUNTY OF DECATUR.

“ In the Decatur Circuit Court.

“ The undersigned, citizen of this county, would represent that William M. Nyce is an inhabitant of this county, aged twenty-eight years, and is a person of unsound mind, and incapable of managing his own estate, and that said Nyce is here personally in open court, and the petitioner asks that an inquest be had as to the sanity of said Nyce.

“ Respectfully submitted,

“ ORLANDO HAMILTON.

“ Subscribed and sworn to November 28th, 1881.

“ E. F. DYER, Clerk.”

To this statement the clerk filed an answer of general denial, as required by the statute. The record states that the cause being at issue, and the said William M. Nyce being in open court, a jury was empanelled and sworn to try the cause; that having heard the evidence, without leaving the box, the jury returned a verdict that the said William M. Nyce was a person of unsound mind and incapable of managing his estate. Upon the return of this verdict, appellant was adjudged a person of unsound mind, a guardian was appointed for him, who gave bond and qualified as such.

Appellant filed no motion for a new trial, nor did he object to the proceedings in any way until he filed the record in this court in November, 1882. The objection now urged and discussed by his counsel is, that no notice was issued and served upon him previous to the trial below; that because no such notice was issued and served, the court below did not acquire jurisdiction, and the judgment should, therefore, be reversed.

The statute provides that upon the proper written statement being filed, “such court shall cause such person to be pro-

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Nyce v. Hamilton.

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duced in court, and shall cause an issue to be made by the clerk of such court, denying the facts set forth in such statement; which issue shall be tried by a jury, to be empanelled under the direction of said court." Section 2545.

If in this case appellant had been thus "produced in court," it could not be said, with reason, that additional notice would have been required to give the court jurisdiction. This mode of acquiring jurisdiction over the person is fixed by the law-making power, and we know of no reason why it is not sufficient, or upon what ground it can be claimed that the Legislature has no authority to prescribe it.

Upon a fair interpretation of the record, it shows that from the time of the filing of the written statement by appellee until the return of the verdict, the judgment thereon, and the appointment of a guardian, appellant was in open court in attendance upon the proceedings.

Being thus present, it is immaterial, as it seems to us, whether he was produced by order of the court, by appellee, or appeared voluntarily. In either event, he would have the same opportunity to defend and protect his rights. See *Hutts v. Hutts*, 62 Ind. 214. If the proceedings had taken place in his absence, without any kind of notice, a different question would be presented, which we need not and do not decide in this appeal.

It will not be necessary for us to go into a review of all the cases cited by the learned counsel for appellant.

We may say of them generally, that they are decisions under a state of facts different from the case under consideration, or under statutes requiring a certain fixed notice. In the case of *Dutcher v. Hill*, 29 Mo. 272, the person alleged to be of unsound mind had no notice and was not present in court. The ruling of the court was, that he should have had notice, or be in court, as required by the statute.

The case of *Shumway v. Shumway*, 2 Vt. 339, was decided under a statute which required notice to be given to the alleged *non compos*.

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Nyce v. Hamilton.

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In the cases of *Eddy v. People, ex rel.*, 15 Ill. 386, and *Chase v. Hathaway*, 14 Mass. 222, the persons alleged to be of unsound mind had no notice, and were not present in court. The case of *Morton v. Sims*, 64 Ga. 298, arose and was decided under a statute requiring ten days' notice. Counsel cite, as being most directly in point, *Ex parte Whitenack*, 2 Green Ch. N. J. 252. It is patent from the case that the statute of New Jersey upon the subject of such proceedings, was very materially different from ours. Whitenack having learned, a short time before the hearing, that proceedings were in progress to have him adjudged to be of unsound mind, appeared before the commission. After the finding against him, and before further action by the Chancellor, he made a showing that for want of proper notice he had not had a fair and full hearing, and asked that the proceedings be suspended, and that he might have leave to traverse the inquisition. This was granted him. In this respect it was a case somewhat such as this would have been, had the appellant asked a postponement to prepare for trial, or for a rehearing, upon the ground that for want of sufficient time to prepare for trial he had suffered in his rights. Had these requests, or either of them, been made in the court below, it may be presumed that the proper disposition would have been made of them.

There being no error in the record the judgment is affirmed.

#### ON PETITION FOR A REHEARING.

ELLIOTT, J.—It appears from the record that the appellant was in open court and remained throughout the investigation, that the clerk filed the answer required by statute, and that a jury was empanelled and the issue tried as the law directs. Even if a notice had been necessary, as the counsel insist, it could have done nothing more than secure the production of the person whose mental condition was the subject of investigation in open court, and this right was fully accorded him, as well as all rights consequent upon it. The whole purpose of a notice was accomplished and no harm re-

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The State, *ex rel.* Parnell *et al.*, v. Sanders *et al.*

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sulted. We are bound to presume that the court proceeded in accordance with the law, and that the clerk filed the answer because, the appellant being in court, it was his duty so to do. So that even conceding, but by no means deciding, that a formal service of notice is in any case required, the omission in this could have worked no harm, for appellant was given all that a notice could have secured him. The purpose of the statute is not merely to secure service of notice upon the person alleged to be insane, but to secure his production in open court. It means that the person shall be produced, or some excuse shown for a failure to produce him.

Petition overruled.

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No. 10,919.

THE STATE, EX REL. PARNELL ET AL., v. SANDERS ET AL.

DECEDENTS' ESTATES.—*Action by Heirs to Recover Claim.—Complaint.—Necessary Averments.*—In an action by the heirs at law of a deceased person to recover a claim due the estate of such person, it is necessary to allege in the complaint, in addition to the averments that there are no debts and that no administration has been granted upon such estate, that such decedent left no widow, or, if he did, that such widow has relinquished her interest in such estate; otherwise the complaint is insufficient upon demurrer, as it does not show that such heirs are entitled to the claim.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellees.

BEST, C.—The State, on the relation of Susannah, Phebe, Mary, George, Jesse, Eli, Jonathan and Venice Parnell, brought this action upon a bond executed by Lucinda Sanders, as administratrix *de bonis non* of the estate of Benjamin Sanders, deceased, and by Clark Blair as her surety, to recover such damages as the relators had sustained by reason of the alleged failure of said administratrix to pay a claim of

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\$380.50 due from said estate to the estate of James Parnell, deceased.

A demurrer to the complaint was sustained, and this ruling is assigned as error.

The only averments made in the complaint to show that the relators are entitled to maintain this action are these: "That James Parnell, who died in November, 1876, intestate, not being in debt to any person, and no administration has been had on his estate, leaving the above named relators as his heirs at law."

These averments, in our opinion, failed to show that the relators were entitled to the money due the estate of James Parnell, deceased, and hence they were not entitled to maintain an action upon the bond. *Prima facie*, the right of action upon the claim, and consequently upon the bond, was in the personal representative, but there are cases where the heirs may maintain the action. *Schneider v. Piessner*, 54 Ind. 524; *Church v. Grand Rapids, etc., R. R. Co.*, 70 Ind. 161; *Waltz v. Waltz*, 84 Ind. 403.

In such case, the complaint should aver every fact necessary to show that the heirs are entitled to the money, and in order to do this it must be averred that the decedent left no widow, or that she has relinquished her claim. *Schneider v. Piessner, supra*; *Williams v. Riley*, 88 Ind. 290.

This averment is not made. The averment is that the relators are the "heirs at law" of the decedent. The phrase "heirs at law" must be taken in its ordinary signification, and can not be construed either to mean that the decedent left no widow, or, if so, that one of the relators is such widow. The averment as made did not show the relators to be entitled to the money, and for that reason the demurrer was properly sustained. The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the relators' costs.

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 Drinkout v. The Eagle Machine Works.
 

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No. 10,684.

## DRINKOUT v. THE EAGLE MACHINE WORKS.

**PRACTICE.**—*Instructions.*—*Statute Construed.*—The proviso to section 650, R. S. 1881, makes no change in the former practice as to making up a record in order to secure the judgment of the Supreme Court upon instructions given.

**SAME.**—*Instructions.*—*Supreme Court.*—*Presumption.*—That an instruction assumes the truth of a fact which is admitted, or not disputed, is no objection to it, and the Supreme Court, when the evidence is not in the record, will presume that facts so assumed were admitted or conclusively proven.

**NEGLIGENCE.**—*Injury to Employee by Co-Employee.*—*Complaint.*—*Evidence.*—*Variance.*—A complaint by a servant against his master for injury caused by defective machinery is not supported by evidence that the injury was caused by negligence of the defendant's superintendent.

From the Superior Court of Marion county.

*R. N. Lamb* and *S. M. Shepard*, for appellant.

*A. C. Harris* and *W. H. Calkins*, for appellee.

**HAMMOND, J.**—This is an appeal under section 650 of the code of 1881, upon the question of the correctness of instructions to the jury. So much of said section as applies to an appeal in such case is contained in the proviso, reading as follows: "*Provided*, That when in any case an appeal is prosecuted upon the question of the correctness of instructions given or refused, or the modifications thereof, it shall not be necessary to set out in the record all the evidence given in the cause, but it shall be sufficient in the bill of exceptions to set out the instructions or modifications excepted to, with a recital of the fact that the same were applicable to the evidence in the cause."

The above proviso in section 650, R. S. 1881, was added to the parallel section, 559, of the code of 1852, but we do not think it makes any change in the practice with respect to instructions given to the jury. Its effect is to entitle instructions not given to a consideration in this court, that they would not otherwise receive. It does not dispense with a

90	438
195	89
195	459
90	438
130	324
90	423
139	207
90	423
148	94
152	628
90	423
156	230

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motion for a new trial. The recital in the bill of exceptions of the fact that the instructions given were applicable to the evidence makes no important addition to the record. In the absence of the evidence, without such recital, this court would presume that the charges were applicable to the case made. *Wade v. Guppinger*, 60 Ind. 376. The proviso above quoted makes no change in the rule, settled by numerous decisions, that this court, where the record does not contain the evidence, will not reverse the trial court on the instructions given, unless they are so radically wrong as not to apply to any supposed case which might have been made by the evidence. *Buskirk's Practice*, 345, and cases cited.

The appellant sued the appellee in a complaint of three paragraphs, alleging in each that the appellee as a corporation was doing business in the city of Indianapolis as founders and machinists; that on October 9th, 1879, while the appellant was in the employment of the appellee as a laborer, in filling a "flask" with molten iron, said "flask," without any fault or negligence of the appellant, burst open, letting the molten iron run out and into his shoes and upon his feet, thereby scalding, burning and permanently injuring him. It is charged in various ways in the several paragraphs, that the bursting of the "flask" was caused by the defective and improper machinery and appliances of the appellee; that, the "flasks" used by the appellee were unsafe, insecure and unfit for the purposes for which they were used, and that the fastenings of the "flask" in question were insecure, all of which defects are alleged to have been well known to the appellee.

Issue was made and the case tried by a jury, resulting in a verdict for the appellee. Motion for new trial overruled, exceptions, judgment on verdict, appeal to the general term, and judgment of the special term affirmed.

The only ground urged in this court for the reversal of the judgment was the giving by the trial court, on its own motion, of instructions numbered six and sixteen.

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The first of said instructions was the following :

“ 6. One of the risks which an employee assumes is the injuries which he may sustain by reason of the carelessness or negligence of his fellow servants. In this case there is evidence tending to show that Mr. Taylor prepared the ‘flask’ for making the casting. Although Mr. Taylor may have had charge of the foundry department in the shops of the department, yet, in preparing the flasks for the making of the castings, he would not, necessarily, be acting in the capacity of a foreman, but in that of an employee or servant, rather; and if the accident whereby the plaintiff was injured was caused by the carelessness or negligence of Mr. Taylor in preparing the flasks to receive the molten metal, and not on account of any imperfections in the flask itself, nor on account of any danger by reason of its being too small, or otherwise illy adapted to patterns, such as that used in it at the time of the accident set out in the complaint, then the defendant is not liable, and your verdict should be against the plaintiff.”

It is objected to this instruction that it invades the province of the jury in assuming that the injury was caused by the carelessness or negligence of Mr. Taylor in preparing the flasks; and, also, in assuming that Mr. Taylor could act in the capacity of foreman and employee, so that, while acting in the latter capacity, his carelessness or negligence would be that of a fellow servant, for which the master would not be liable. Conceding, without deciding, that the instruction would be open to the objections urged, if the evidence in reference to the facts therein referred to was conflicting, yet, as the evidence is not before us, we must assume that the facts alluded to were either admitted or conclusively proved at the trial. Where there is no dispute about a fact, its existence may be assumed by the court in its charges. Containing an abstract proposition of law, we think the instruction was correct. *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174; *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26; *Gorm-*

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*ley v. Ohio, etc., R. W. Co.*, 72 Ind. 31. We can not, as a matter of law, nor as a matter of fact, without the evidence, say that Mr. Taylor may not have acted as foreman in some particulars, and simply as employee, with respect to others.

There is another ground upon which the instruction may be sustained. If the evidence showed, or tended to show, as we must presume it did, that the appellant's injury was caused by the carelessness or negligence of Mr. Taylor in preparing the flask, it was proper for the court to inform the jury that the appellant could not recover on that account, for the reason, if for no other, that this ground of recovery was not embraced in the complaint. The causes of the injury, as set out in the complaint, were defective, unsafe and insecure machinery, appliances and flasks, and insecure fastenings to the flask, which burst, causing the injury, and not carelessness or negligence in preparing the flask for making castings. Whether the appellee, in any event, would be responsible for such carelessness or negligence, could not be considered in this action, as the appellant's cause of action was not based upon it.

No objection is made to the sixteenth instruction, except that the court assumed as true certain facts referred to in the instruction. This is answered by what has already been said, that we can not, in the absence of the evidence, consider whether or not there was error in an instruction assuming the truth of a fact. Besides, we do not think, that if the evidence were before us, the instruction would be open to the objection urged. It seems to be fair, and, we think, correctly states a proposition of law.

The decision of the court below will have to be affirmed.  
Judgment affirmed, with costs.

Gheens v. Golden.

No. 10,312.

## GHEENS v. GOLDEN.

**PLEADING.—Complaint.—Contributory Negligence.**—An averment in a complaint for damages for injuries negligently caused, that the plaintiff was without any fault, sufficiently negatives contributory negligence on his part, unless it clearly appears otherwise from the specific facts stated.

**SAME.—Practice.—Harmless Error.**—Striking out a paragraph of answer averring facts admissible in evidence under the general denial pleaded, is not available error.

**SUPREME COURT.—Record.—New Trial.**—Neither affidavits nor instructions become part of the record on appeal by incorporating them in the motion for a new trial.

From the Clark Circuit Court.

*S. S. Johnson and J. G. Howard*, for appellant.

*J. K. Marsh, A. Baker and S. B. Toney*, for appellee.

**ELLIOTT, J.**—The appellee obtained a judgment against the appellant for injuries received while in the service of the latter and engaged in operating machinery connected with a cement mill, and from that judgment this appeal is prosecuted.

It is urged that the second paragraph of the complaint is bad, because it does not state facts showing that the appellee was free from contributory negligence. This position can not be maintained. It is averred that the injury occurred without any fault of the plaintiff, and this is a sufficient averment of the fact that he was not guilty of contributory negligence. Where the complaint contains such an allegation, it will be deemed sufficient upon this question unless it clearly appears from the specific facts pleaded that the plaintiff was himself guilty of negligence. *Rogers v. Overton*, 87 Ind. 410; *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Indianapolis, etc., R. R. Co. v. Hamilton*, 44 Ind. 76; *Riest v. City of Goshen*, 42 Ind. 339.

The matters pleaded in the second paragraph of the answer were admissible in evidence under the general denial which remained standing, and no error was committed in striking out that paragraph.

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134	96
90	427
139	184
90	427
152	181
90	427
156	278

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 Brooks v. The State.
 

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Neither affidavits nor instructions can be brought into the record by incorporating them in the motion for a new trial, and as the affidavits and instructions only appear in the motion for a new trial, we can not regard them as properly forming any part of the record. *Blizzard v. Riley*, 83 Ind. 300; *Dennerline v. Gable*, 73 Ind. 210; *Bates v. State*, 72 Ind. 434.

We have read the evidence with care, and while we feel that a different verdict would have been more in accordance with our views of the effect of the evidence, still we can not say that there is not evidence fairly sustaining the verdict, and where this is so we must respect the opinion of the jury evidenced by their verdict, and that of the trial court expressed in its judgment.

Judgment affirmed.

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 No. 10,715.

## BROOKS v. THE STATE.

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148	702

**CRIMINAL LAW.**—*Murder in Second Degree.*—*Instructions.*—A homicide, to constitute murder in the second degree, must be perpetrated purposely and maliciously; and an instruction to the jury to the effect that certain facts enumerated therein, if found, would be murder in that degree, *purpose* and *malice* not being included in the enumeration, is a fatal error.

From the Wayne Circuit Court.

*T. J. Study* and *H. C. Fox*, for appellant.

*F. T. Hord*, Attorney General, and *C. E. Shiveley*, Prosecuting Attorney, for the State.

**NIBLACK, C. J.**—This was a prosecution for murder in the first degree. The indictment charged the appellant, Arthur Brooks, with having, feloniously and with premeditated malice, killed one Thomas Gause, in Wayne county.

There was a change from the regular judge, and the cause was tried by a judge called from another circuit. There was a

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Brooks v. The State.

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verdict finding the appellant guilty of murder in the second degree, and fixing his punishment at imprisonment for life. A refusal to grant a new trial, and judgment on the verdict followed. There was no controversy as to the fact that the appellant had violently assaulted and unlawfully killed Gause at the time and place charged. The only controversy was as to the effect, if any, which certain alleged circumstances ought to have had in mitigating the character of the homicide.

The nature of the circumstances relied upon in mitigation are sufficiently shown, for the purposes of this appeal, by the instructions given to the jury.

The thirteenth instruction given was as follows:

“If the deceased, Thomas Gause, seduced and committed adultery with the wife of defendant upon an occasion when the defendant was absent from home in Minnesota, and afterward the defendant, while at his residence, about dusk of the evening upon which the alleged homicide occurred, detected her with the letter given in evidence to you upon her person, and thereupon by force and persuasion, or either, or any other means, procured the possession of said letter from her, and thereupon attempted to read it, but could not, by reason of the darkness, and they thereupon went to a room upstairs in his said residence, and a lamp was then lit, and he got his revolver from his bed and sat down upon the floor, with his revolver upon his right side, and his wife upon his left, and he read the letter, part at a time, and demanded of her an explanation of what it meant, and she failed to give any, or told him she could not, and he placed his pistol in his pocket, and they thereupon went down stairs, and he started to get his coat out of the wardrobe, and asked her where his coat was, and she told him he had worn it away during the day and not returned it, and thereupon took hold of him, and told him if he would say nothing about it, and promise to live with her, she would tell him all about it, and he asked her how long this thing had been going on, and she then told him that when he was away from home, in Minnesota, Thomas Gause, the

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Brooks v. The State.

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deceased, had come and stayed with her and ruined her, and thereupon, and by reason of said facts and said confession of his wife, he became convinced and honestly believed that said Thomas Gause had seduced and committed adultery with his wife, and thereby, and by reason thereof, became frenzied and excited with a heat of passion, and impelled thereby, he formed the intention to slay the deceased, declared his intention to do so, and broke from her grasp, and immediately went to the office of said Gause, and acting in the heat of passion so engendered by said facts, killed him, such killing would be murder in the second degree, and if you have any reasonable doubt of the falsity of these facts, you could not convict him of murder in the first degree. If after he conceived such intention, if such is the fact, he deliberated and with meditation thought and deliberated upon such intention before he put it into execution, by killing said Thomas Gause, such killing would be murder in the first degree. Likewise, if the defendant had an antecedent grudge against the deceased, and actuated thereby, he conceived and executed such intention to kill, not provoked thereto by the facts above recited, the killing would be murder in the first degree. Such state of facts, as above recited, can in no event constitute such provocation as would reduce the killing, if any, under such circumstances, from murder to manslaughter. They might, and should, in case you should find the requisite premeditation, and convict the defendant of murder in the first degree, be considered by you in determining the penalty to be attached."

It is, amongst other things, objected to this instruction that it invaded the province of the jury by telling them what inference as a fact they should draw from the establishment of certain particular facts, and by singling out particular facts as decisive of the appellant's guilt, without reference to other facts necessary to make out a case of murder in the second degree, and to other facts which may have been established by the evidence.

We think the instruction was erroneously given, for the

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reasons urged, if for no other. It ignored the ingredient of malice in making out a case of murder in the second degree. As will be observed, the instruction told the jury that if the appellant "went to the office of said Gause, and, acting in the heat of passion so engendered by said facts, killed him, such killing would be murder in the second degree." A homicide must be perpetrated *purposely* and *maliciously* to make it murder in the second degree. R. S. 1881, section 1907. The instruction before us does not so inform the jury either directly or inferentially. The inference would seem rather to have been, that if the appellant, acting in the heat of passion engendered by communications then just made to him, killed Gause, that was sufficient to constitute the killing murder in the second degree, thus leaving out of view both the question of intention, and the necessary malicious condition of appellant's mind. The appellant may have resolved to kill Gause before leaving his own house, and yet, for aught that appears in the hypothetical state of facts submitted to the jury, he may have changed his mind and been induced to inflict the fatal blow on account of something which occurred after reaching Gause's office. The hypothetical facts, therefore, fell short of making out a case of murder in the second degree.

Under our system of practice, the court may sum up the evidence and submit hypothetical cases to the jury, but to do either of those things thoroughly and well usually requires very great care. It is a hazardous proceeding for the court, either directly or through the medium of hypothetical cases, to attempt any comments upon the evidence, and particularly to express any opinion upon it beyond an intimation or statement as to what certain evidence may *tend* to prove. The safer way is for the court to announce general principles applicable to the salient points of the evidence, and leave all inferences from facts apparently proven, or which the evidence tended to establish, to the jury. *Longnecker v. State*, 22 Ind. 247; *Larue v. Russell*, 26 Ind. 386; *Barker v. State*, 48 Ind. 163; *Snyder v. State*, 59 Ind. 105; *Cunningham v. State*, 65-

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Ind. 377; *Jackman v. State*, 71 Ind. 149; *Wood v. Deutchman*, 75 Ind. 148; Thompson Charging the Jury, 68, *et seq.*

The instruction, set out as above, was given, as counsel agree, upon the theory that nothing affecting the character or chastity of the appellant's wife short of his catching her in the act of adultery with the deceased could be accepted as sufficient to reduce the homicide to manslaughter, and the question of the proper applicability of that theory to the facts of this case has been elaborately argued on behalf of the appellant as well as the State.

We need only now say that we do not regard the theory in question as applicable to the criminal laws of this State to the extent to which some of the text-writers and some of the courts of other States have carried it, but a full discussion of that question will be more appropriate when it shall be directly presented to this court. *Sawyer v. State*, 35 Ind. 80; *Cheek v. State*, 35 Ind. 492; *Combs v. State*, 75 Ind. 215; *Batten v. State*, 80 Ind. 394; *Stout v. State*, *ante*, p. 1; *Maher v. People*, 10 Mich. 212.

The court gave a carefully prepared and, in most respects, unobjectionable series of instructions, but we find ourselves unable to sustain the particular instruction to which our attention has been directed as above. Considered with reference to the evidence, and to other instructions given and refused, as well as the result of the trial, it appears to have been a controlling instruction in the cause, and to have, consequently, constituted a material error in the proceedings below.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the requisite notice for a return of the prisoner.

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 Vanvalkenberg *et al.* v. Vanvalkenberg *et al.*


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No. 9365.

## VANVALKENBERG ET AL. v. VANVALKENBERG ET AL.

**VERDICT.**—*Contest of Will.*—A verdict finding that the “writing in question, which was read to the jury, is the last will of said M. V.,” though informal, is sufficient, no paper but the contested will having been read to the jury.

**ERROR.**—*Transcript.*—*Deposition.*—*Presumption.*—If error be not affirmatively shown by the record, there will be no reversal by the Supreme Court; and when the record fails to show for what cause a deposition, in whole or in part, was suppressed, the Supreme Court will presume in favor of the correctness of the trial court.

**WILL.**—*Instructions.*—*Case Followed.*—Instructions to the jury like those in *Bundy v. McKnight*, 48 Ind. 502, numbered 2, 7, 8, are not erroneous.

**SAME.**—*Verbal Inaccuracies.*—Inaccuracy of language in an instruction, which would not probably mislead intelligent men, will not be deemed available error.

**SAME.**—*Evidence of Mental Capacity of Testator.*—Where physicians have testified as to the mental condition of one who attempted to make a will, which is under contest, it is error to tell the jury that no medical experts have testified, and that the finding, as to testamentary capacity, must be based upon the testimony of neighbors and intimate friends of the deceased, as to facts known to them, and their opinions based thereon.

**SAME.**—*Undue Influence.*—Undue influence, destroying free agency, when a will was made, vitiates the will, though the devisee may have had no agency in procuring its exercise and no knowledge of the fact.

**SAME.**—*Evidence.*—*Declarations.*—*Res Gestæ.*—Declarations of the testator as to the importunities of a devisee for a favorable will, made at a time so remote from the execution of the paper that they are not part of the *res gestæ*, can be considered only upon the question of testamentary capacity.

From the Lake Circuit Court.

*M. Wood* and *T. J. Wood*, for appellants.

**HAMMOND, J.**—On August 31st, 1878, Martha Vanvalkenberg, the mother of some, and the grandmother of others of the parties in interest in this action, died, leaving an instrument of writing, executed July 17th, 1878, purporting to be her will. In this, all her real estate and personal property, of the value of several thousand dollars, were devised and

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136	8
90	433
138	253
90	433
165	361

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bequeathed to her daughter, the appellee Lucinda Vanvalkenberg.

This was a proceeding by the appellants to resist the probate of said instrument of writing, and to have the same declared invalid.

The appellants allege in their complaint that the testatrix at the time of executing the will was of unsound mind; that at the time of signing it she did not know its contents; that it was not duly executed; and that its execution was obtained by undue influence, duress, fraud, force and threats. The appellees, except Lucinda, made default; she answered by a general denial.

The judge of the court below having been engaged as counsel in the case prior to his term as judge, appointed a special judge who presided at the trial. The case was tried by a jury, who returned this verdict: "We, the jury, find that said paper writing in question, which was read to the jury, is the last will and testament of said Martha Vanvalkenberg."

The appellants moved for a *venire de novo*, on the ground that the verdict was informal, illegal and did not determine the questions in issue. The court overruled this motion, and the appellants excepted. The appellants then, on written causes, moved for a new trial. This motion was also overruled, and to this ruling they excepted. Judgment was rendered, admitting the will to probate, and directing it to be recorded as the last will and testament of the decedent.

The errors properly assigned in this court are: That the court below erred in overruling the motion for a *venire de novo*; also erred in overruling the motion for a new trial; and, also, erred in rendering judgment on the verdict.

No objection is made to the judgment except that the verdict was insufficient. The first and last errors assigned may, therefore, be considered together.

While the verdict is somewhat informal, we think that it is sufficient. A *venire de novo* is granted only where the verdict, whether general or special, is imperfect by reason of some un-

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certainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages in a case where such assessment is necessary. Under the evidence, the paper writing mentioned in the verdict as read to the jury, could only refer to the alleged will, and the finding that such paper writing was the last will and testament of the testatrix was the same as finding that it was duly executed and not invalidated from any of the causes set out in the complaint. A verdict is sufficient if it can be determined from it what the finding is upon the issues. 1 Works Pr., sections 837-8.

We come to the appellants' motion for a new trial. Six causes were contained in the motion, which will be considered in their order.

The first and second reasons for a new trial were to the effect that the verdict was contrary to the evidence and contrary to law. While it was conflicting, there was sufficient evidence fairly to sustain the verdict. Under the well established rule of appellate courts in such cases, we can not disturb the judgment below upon the question of the weight of evidence.

The third ground for a new trial was, "That the court erred in refusing to permit the contestors to put this question to William A. Winslow and Julius Deming, witnesses in said cause, to wit: 'Did you not go and see Martha Vanvalkenberg with the intention of procuring her to make a will of all her property to her daughter Lucinda Vanvalkenberg?'"

The appellants in their brief do not discuss the alleged error of not permitting Winslow to answer the above question, and the record fails to show that the question was asked Deming.

The fourth reason for a new trial is that the court erred in sustaining the appellee's motion to suppress parts of the depositions of certain named witnesses. The bill of exceptions shows that, after the jury was sworn to try the case, the court sustained the appellee's motion to strike out parts of depositions, to which the appellants objected on the ground

that the motion came too late. The reason for suppressing parts of the depositions is not shown in the record. A deposition may be suppressed, after the commencement of the trial, if any matter which is not disclosed in the deposition appears, which is sufficient to authorize such suppression. Section 438, R. S. 1881. And where the record fails to show for what cause a deposition, in whole or in part, was suppressed, we must presume in favor of the correctness of the ruling. In other words, the rulings of the trial court, unless affirmatively shown by the record to be erroneous, will be sustained by this court. *Glenn v. Clore*, 42 Ind. 60.

The fifth cause for a new trial was the alleged error of the court in giving instructions numbered from one to ten inclusive.

It is claimed that the first instruction had a tendency to mislead the jury by conveying the impression that signing a will alone constituted its proper execution. We do not think the instruction is open to this objection. It is substantially the same as instruction numbered 2 in *Bundy v. McKnight*, 48 Ind. 502, 504, which was held good. The second instruction is, in all material respects, like that numbered 7, on page 510, in the case above named. It was held proper in that case, and we are satisfied it is good in this.

The third instruction follows substantially instruction numbered 8 in that case on page 511, and we must hold, as it was held there, that it is sufficient. An evident clerical mistake near the close of the instruction, as the record comes here, in using the words "him well" for "his will," makes some little confusion in the meaning, but if we were compelled to presume that the learned attorney who presided at the trial as special judge actually made this mistake, we would still presume that the error was so manifest, and the meaning intended so apparent, that an intelligent jury would not be misled.

The following passage occurs in the fourth charge: "No medical experts have been examined, and the testimony of the

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Vanvalkenberg *et al.* v. Vanvalkenberg *et al.*

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neighbors of the testatrix and those persons who have been most intimate with her, and their opinions, together with the facts stated by them upon which their opinions are based, must be considered by the jury, and from which their finding must result."

In the above extract, the court, inadvertently, no doubt, overlooked the evidence of Drs. Bliss and Brown, both of whom were attending physicians on the testatrix in her last sickness. Dr. Bliss was present at the execution of her will, and was one of the attesting witnesses. In his opinion, she was then of sound mind. Dr. Brown, who attended on her some four months, almost daily, until within a short time before the execution of the will, describes her physical and mental condition as being extremely feeble, and his opinion is decidedly adverse to her testamentary capacity.

The effect of the above instruction would be to withdraw this evidence from the minds of the jury, or to impress them with the belief that, as a matter of law, it was entitled to no greater weight than the testimony of witnesses making no claim to medical skill. The fact that the opinions of the doctors conflict made no difference. The right of the jury to consider all the evidence, to determine its weight, and to give preference, if they chose, to the evidence of one witness over that of another, should not have been interfered with by the court.

In the sixth instruction, the jury was informed that "if it be shown, to the satisfaction of the jury, by a preponderance of the evidence, that the mind of the testatrix was so operated upon by the contestee, or by others *at her request, and in her interest and with her consent*, \* \* \* to such an extent that the free agency of the testatrix was destroyed, \* \* \* the will so executed can not be upheld."

This was error. If the free agency of the testatrix in making the will was destroyed by the undue influence of persons other than the contestee or devisee, it would make no difference whether such influence was used at her request, or with her consent, or not. If the free agency of the testatrix was

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destroyed by undue influence, so that she made a will contrary to her judgment and intention, it is immaterial by whom such influence was exercised. The will in such case would be invalid. *Davis v. Calvert*, 5 Gill & Johnson (Md.) 269; S. C., 25 Am. Dec. 282.

Complaint is made of the eighth instruction. In this the jury was informed, in substance, that statements and declarations of the testatrix, made at times other than when the will was executed, respecting the importunities of her daughter, the devisee, to make a will in her favor, could be received only upon the question of the testamentary capacity of the testatrix, and were not to be considered by the jury as evidence that such importunities were in fact made. Under the evidence this instruction was correct. There was no evidence tending to show that the testatrix made any such declarations at the time of executing the will, or at any time so near thereto that it could possibly be considered as part of the *res gestæ*. In such case the authorities concur that the declarations of a testator are admissible for no purpose except upon the question of his mental capacity to make a will. *Runkle v. Gates*, 11 Ind. 95; *Hayes v. West*, 37 Ind. 21; *Todd v. Fenton*, 66 Ind. 25.

No objections of any force are urged against the other instructions, and we think they were properly given.

The sixth and last cause for a new trial relates to the alleged error of the court in refusing to permit the appellants to impeach the testimony of a witness for the appellee, by the evidence of the witness's wife. The bill of exceptions does not show what the appellants proposed to prove by the wife, and we must, therefore, presume that the court properly excluded her testimony.

For the errors in the instructions referred to a new trial should have been granted.

Judgment reversed, at appellee's costs, with instructions to the court below to grant a new trial, and for further proceedings.

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 Borchus *et al.* v. Saylor.
 

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No. 11,108.

## BORCHUS ET AL. v. SAYLER.

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**MANDAMUS.**—*Bill of Exceptions.*—*Motion to Compel Judge to Sign.*—*Master Commissioner.*—*Practice.*—A cause was referred to a master commissioner with direction to report the evidence, which he did not do, but reported his finding of the facts. The petitioner, who now seeks a mandate to compel the judge below to sign a bill of exceptions containing the evidence, made no objection to the report, but upon his motion the judge stated conclusions of law upon the facts so reported, and rendered judgment accordingly. On the first day of the next term, the finding of the master was first questioned by a motion for a new trial, which was overruled at a subsequent term, and the bill of exceptions tendered.

*Held*, that, by his motion for conclusions of law upon the facts stated in the report, the petitioner affirmed the correctness of the facts as found, and was not afterwards at liberty to question them, and so the judge could not be required to sign the bill.

Application for writ of mandamus.

*T. G. Smith* and *R. E. Smith*, for petitioners.

*J. B. Kenner* and *J. I. Dille*, for respondent.

**ELLIOTT, J.**—The petitioners are appellants in the case of *Borchus et al. v. The Huntington Building and Loan Fund Association*, and seek a mandate to compel the Honorable Henry B. Saylor, judge of the Huntington Circuit Court, to sign a bill of exceptions tendered him in that case.

The petition and return refer to the record in that cause, and do little more than rehearse the matters which appear of record, and these matters, so far as they bear upon the present investigation, may be thus summarized: On the 12th day of April, 1882, the cause above named was, by agreement of the parties, referred to a master commissioner, with instruction to report the evidence; at the ensuing June term the commissioner reported the facts but not the evidence; no exception was taken to the report by either party, nor was any objection whatever suggested as to the correctness of the finding of facts; but, on the contrary, the petitioners moved the court to "give its conclusions of law in writing upon the facts

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*Borchus et al. v. Saylor.*

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found," and the plaintiff, in the case named above, moved for judgment "upon the report of the commissioner upon the facts;" on the following day the court filed conclusions of law on the facts found by the commissioner, and gave the plaintiff judgment; the petitioners excepted to the conclusion of the court, but did not challenge by motion, exception, or suggestion, the correctness of the commissioner's finding upon the questions of fact; this action was had on the 30th day of June, 1882; on the first day of the October term the petitioners filed a motion for a new trial, and also moved that the testimony given before the commissioner be made part of the record; no action was taken on these motions until the March term, 1883, when they were overruled, and ninety days' time given in which to file a bill of exceptions; within the time designated a bill containing the evidence given before the commissioner was tendered to the judge, and he refused to sign it.

It seems very plain to us that the petitioners, by failing to make any question as to the correctness of the finding of facts, by their omission to require a report of the evidence, and by their request to the court to state conclusions of law on the facts found, waived all questions as to the correctness of the commissioner's report upon the questions of fact. The course adopted was such as affirmed that the facts were correctly found and stated, and, therefore, nothing was submitted to the court except the questions of law. It was, in effect, a concession that there was no dispute as to the facts; it was a tacit request to the court to assume the facts to be as found, and ascertain and apply the rules of law governing such cases. There was no intimation that the facts were not correctly found and reported. The only facts to which the attention of the court was directed and upon which it was asked to pass, were those stated in the commissioner's report; there was no suggestion that the court should look to the evidence to ascertain whether the facts were correctly stated. Having, without questioning the finding of the commissioner, asked a ruling upon the facts found, and on the theory that they were correctly found, the petitioners

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 McCoy v. Monte et ux.
 

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are not in a situation to shift position and ask that the court shall disregard the tacit concession and review the finding of facts. If the petitioners had desired to secure a review of the finding upon the evidence, they should have excepted, or objected in some appropriate method, before moving the court to put its conclusions and judgment on the facts found.

The trial judge was not asked to examine the evidence, but was asked to apply the law to the facts found by the commissioner, and, as only such questions are reviewable as were presented to the judge, it follows that no question as to the correctness of the commissioner's finding upon the facts can be reviewed on this appeal. It is, therefore, neither necessary nor proper to encumber the record with the evidence. The appellate court must act upon the facts presented to the trial court, and these were those stated in the commissioner's report, and there is, therefore, no reason for recurring to the evidence. The petitioners have no right to ask that the trial judge shall be compelled to do a fruitless act, and such is the character of the act which it is here sought to have us compel the judge to do. Nor is a judge bound to sign a bill of exceptions setting forth evidence upon which he was never required, directly or indirectly, to pass, and on which no ruling was made by him.

Writ refused.

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 No. 10,780.

McCoy v. MONTE ET UX.

**PLEADING.**—*Action to Quiet Title.*—*Counter-Claim.*—*Demurrer.*—*Harmless Error.*—Where, in an action to quiet title to real estate, the defendant files a counter-claim, to which a demurrer is sustained, and the court, upon the trial, merely renders judgment against the plaintiff upon his complaint, the ruling upon the demurrer to the counter-claim, if erroneous, is harmless.

**TRUST AND TRUSTEE.**—*Conveyance.*—Where real estate is conveyed to A. and B., husband and wife, in trust for C., his children and their descend-

90	441
129	219
90	441
146	281

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McCoy v. Monte *et ux.*

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ants, if he shall have any, and in the absence of such children or their descendants in trust for the heirs of A. and B., with power to sell and convey such land with the consent of C., and reinvest the proceeds in other land to be held for the same purposes, such conveyance does not, under our statute, invest C. with the legal title to such land, and he cannot, therefore, convey it to another.

From the Jay Circuit Court.

*D. T. Taylor, J. M. Smith, T. Bailey, J. W. Headington and J. J. M. Lafollette*, for appellant.

*J. M. Haynes and S. W. Haynes*, for appellees.

BEST, C.—The appellant brought this action against the appellees to quiet his title to certain real estate in the complaint described, alleging in his complaint that he was the owner in fee simple, and that the appellees claim some interest in the land adverse to him.

The appellees filed an answer of three paragraphs. The first was a general denial and the others were special. A demurrer was overruled to the second and sustained to the third. A counter-claim was also filed, to which a demurrer was overruled. An answer in denial of the counter-claim and a reply in denial of the second paragraph of the answer completed the issues. These were submitted to the court for trial, and a finding made for the appellees. A motion for a new trial was overruled and judgment rendered upon the finding for costs.

The errors assigned are that the court erred in overruling the demurrer to the counter-claim, in overruling the demurrer to the second paragraph of the answer, and in overruling the motion for a new trial. The court, as will be observed, did not render any judgment upon the counter-claim, and hence, if the ruling upon the demurrer thereto was erroneous, it was harmless. It therefore becomes unnecessary to examine the question raised by it, and we pass it.

The second paragraph of the answer alleged, in substance, that the appellees, on the 10th day of March, 1875, purchased the land in the complaint mentioned and paid therefor \$1,400; that being desirous of making some provision for one Jo-

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McCoy v. Monte *et al.*

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seph Stroble, the son of Mary Monte, the wife of her co-appellee, they caused the owner of said land to convey it to them as trustees in trust for said Joseph Stroble during his natural life, subject to the following condition contained in said deed, viz.: "To have and to hold the above granted premises unto them, the said Jacob Monte and Mary Monte, as trustees, their heirs and assigns forever, in trust, for the use and benefit of Joseph Stroble, of Jay county, son of said Mary Monte, for and during the natural life of said Joseph Stroble. And if said Joseph Stroble should die, leaving a child or children, or descendants of such child or children, then in trust for such child or children, or descendants, their heirs and assigns forever; but if said Joseph Stroble should die without leaving children or descendants, then in trust for the heirs of the said Jacob Monte and Mary Monte, their heirs and assigns forever, subject, however, to the right of said Jacob Monte and Mary Monte, as trustees as aforesaid, to sell and convey said real estate by the advice and consent of said Joseph Stroble, and to invest the proceeds of such sale in other real estate as trustees in trust for the same parties, and upon the same terms and conditions as before in this conveyance set forth. And if either trustee should die, the survivor shall be authorized to sell, convey and reinvest as fully as the two can while living."

That immediately after such conveyance was made said Stroble took possession of said land and retained the same until September, 1882, when he quit the possession and quit-claimed the land to appellant for \$25; that the appellant has no title thereto other than such as he acquired by said conveyance, and that the appellees have never conveyed or otherwise disposed of the same. Wherefore, etc.

The appellant claims that the conveyance mentioned in this paragraph conveyed to the appellees a nominal title only, without any power of disposition or management of the land, and, as such conveyance under our statute is deemed void as

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McCoy v. Monte *et ux.*

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to the trustee and a direct conveyance to the beneficiary, the paragraph was insufficient.

The statute relied upon is in these words: "A conveyance or devise of lands to a trustee, whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." R. S. 1881, sec. 2981.

Where a conveyance is made to one for the use of another, this statute, as a rule, executes the use and turns the interest of the *cestui que use* into a legal instead of an equitable estate. 1 Perry Trusts, section 298.

In such case the title of the trustee must be nominal only, and the entire estate must be given to the beneficiary. Where the title of the trustee is not nominal, and the entire estate is not given to the beneficiary, the statute does not execute the use, but the legal title remains in the trustee in trust for the beneficiary.

In this case the entire estate is not given to Joseph Stroble; at most, he is only given a life-estate, and the estate in remainder is for the use of his heirs, if any, and if not, for the heirs of the trustees. In such case the statute will not execute the use so as to confer upon him a title in fee simple, as no such estate was conveyed to his use. In case of his death without issue, the trustees are required, by the terms of the conveyance, to hold this land in trust for their own heirs. Whether this clause, upon the happening of the contingency, shall be deemed to create a valid remainder for such heirs or a fee in the trustees, it is unnecessary to determine, as in either case the statute can not operate without defeating an estate in other beneficiaries.

Again, the trustees are required, with the advice and consent of said Stroble, to sell this land and invest the proceeds in other lands for the use and benefit of the same persons. This requirement imposes a duty upon the trustees that they can not discharge without retaining the legal title, and in such case the statute never executes the use. Whenever any agency,

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Webb v. Zeller.

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duty or power is imposed upon the trustee in relation to the land conveyed, the trust is said to be an active one, and the statute in such case does not execute the use. 1 Perry Trusts, section 305, and authorities there cited.

The fact that the trustees can not sell without the consent of Joseph Stroble does not, as we think, destroy their power of disposition. This is a limitation upon such power, but notwithstanding such limitation a power of disposition was given, and in such case the statute can not operate. The confidence reposed in the trustees, and the discretion to be exercised by them in the disposition of the property and the investment of its proceeds, take this conveyance, in our opinion, out of the operation of the statute. For these reasons we think the paragraph in question was sufficient, and that the demurrer thereto was properly overruled.

No available error was committed in overruling the motion for a new trial. The appellant had no title to the property other than such as he acquired by the conveyance of Joseph Stroble, and as that did not invest him with the legal title, he was not entitled to recover, and hence it is unnecessary to examine the rulings made upon the trial, a right result having been reached.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

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No. 10,524.

WEBB v. ZELLER.

SUPREME COURT.—*Weight of Evidence*.—The Supreme Court will not disturb a verdict on the mere weight of evidence.

From the Madison Circuit Court.

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 Webb v. Zeller.
 

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*H. D. Thompson and R. Lake*, for appellant.

*J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr.*,  
for appellee.

MORRIS, C.—This suit was brought by the appellant against the appellee upon an award. It is alleged in the complaint that, on the 10th day of September, 1874, the parties agreed by parol to submit certain matters of difference then existing between them to the arbitration and award of three persons, one of whom should be chosen by the appellant, one by the appellee, and the third by the persons so chosen; that pursuant to the agreement the appellee selected James M. Garretson as his arbitrator; that the appellant selected as his arbitrator one Beeson, and that the two arbitrators so chosen selected as the third arbitrator or umpire Charles Harvey; that by the further agreement of the parties the arbitrators met on the 26th day of September, 1874, for the purpose of making their award, of which both parties had notice; that, having fully heard the parties touching their matters of difference, the arbitrators made their award as follows:

“PERKINSVILLE, IND., Sept. 26th, 1874.

“We, the committee appointed to investigate the differences between Bro. Webb and Bro. Zeller in regard to the Perkinsville mill, find that Bro. Zeller is indebted to Bro. Webb to the following amount:

Lost on rent . . . . .	\$ 625 00
Lost on wheat . . . . .	325 00
One run, idle for five months . . . . .	295 00
Total . . . . .	1,245 00
Credit by back rent . . . . .	300 00
Balance . . . . .	945 00
Improvements . . . . .	100 00
Total indebtedness . . . . .	\$1,045 00

“LEX BEESON.

“CHARLES HARVEY.

“J. M. GARRETSON.”

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Webb v. Zeller.

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It is averred in the complaint that the arbitrators, by mistake and inadvertence, used the word "committee" for and instead of the word "arbitrators"; that the words "Bro. Webb," as used in said award, meant, and were intended to mean, the appellant, and the words "Bro. Zeller" meant the appellee; that copies of said award were duly served upon the respective parties on the 28th day of September, 1874, whereby the appellee became liable to the appellant for the amount of said award; that he had refused to abide by and perform said award. Wherefore the appellant demands judgment.

The appellee answered the complaint by a general denial. The cause was submitted to the court for trial. The court found for the appellee, and over a motion for a new trial judgment was rendered in his favor.

The appellant assigns as error the ruling of the court upon his motion for a new trial.

Counsel for the appellant say: "The question we desire to present is, whether the finding of the court is sustained by sufficient evidence."

The appellant was a witness in his own behalf, and after stating the differences between him and the appellee, and that they were both members of the Masonic lodge at Perkinsville, testified as follows:

"At a meeting of the lodge I asked the master to appoint a committee of one or three to wait on Brother Zeller and ask him if he would not arbitrate with me and make a settlement of the matter; that committee was appointed to wait on him; the committee was appointed to wait on him and ask him in regard to the matter and report what he said; I don't know whether it was in writing, but they reported to the lodge; then, at my suggestion, there was a time agreed upon that we would meet in the hall for the purpose of arbitrating; I selected my arbitrator, and we understood, at least, that he had selected his—the arbitrators met, anyway; Zellers did not come, but his representative was there in his interest; there were fifteen or twenty present at the arbitration; Harvey,

## Beller v. The State.

Beeson and Dr. Garretson acted as arbitrators; it was in the latter part of September, 1874; there was no evidence heard except my statement; they asked me to make a statement of the difficulty existing between us, and I did it, and that was all the evidence heard."

The appellee testified that he never agreed to arbitrate the matters in difference between him and the appellant; that he never selected an arbitrator, and never authorized any one to agree to arbitrate said differences for him, nor to select an arbitrator; that he was not present at any arbitration. The testimony of the appellee is corroborated by other testimony in the case. There is opposing and conflicting testimony in the case, but we think the weight of the evidence supports the finding of the court. As there is testimony legally tending to sustain the finding of the court, we can not disturb it, even though the weight of the evidence should seem to be against it. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

We think there is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 11,018.

## BELLER v. THE STATE.

CRIMINAL LAW.—*Affidavit and Information*.—In a prosecution by affidavit and information, the omission of the name of the affiant in the body or commencement of the affidavit is not a sufficient reason for quashing the information, when it appears that the affiant's name is signed at the close of the affidavit, and that he was sworn to the matters stated therein.

OFFICE AND OFFICER.—*Court*.—Courts take notice of the names and official signatures of their officers.

INSTRUCTION.—*Evidence*.—*Presumption*.—An instruction, correct as a general statement of the law, will, in the absence of the evidence, be presumed to have been applicable to the evidence adduced. If a defendant desires a more specific instruction he must ask it.

From the Wayne Circuit Court.

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Beller v. The State.

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*W. A. Peelle and J. F. Robbins*, for appellant.

*F. T. Hord*, Attorney General, and *C. E. Shiveley*, Prosecuting Attorney, for the State.

ELLIOTT, J.—This is an appeal from a judgment of conviction upon an information charging the appellant with an assault and battery with intent to kill.

The affidavit upon which the information is based does not state in the commencement the name of the affiant, but his name is signed at the close, and it appears that he swore to the truth of the matters stated in it. We do not think the omission to state the name of the affiant in the body or commencement of the affidavit is a ground for quashing the information. It is clear that such an omission does not prejudice the substantial rights of appellant, and we can reverse only where it is made to appear that substantial rights have been prejudiced. R. S. 1881, section 1756.

Courts take notice of the names and official signatures of their officers, and the trial court took notice, *ex officio*, that W. T. Noble was its clerk at the time the affidavit was sworn to, and that his signature is genuine. *Buell v. State*, 72 Ind. 523.

The second instruction given by the court reads as follows: "To convict the defendant of the felony charged, the State must prove beyond a reasonable doubt that at this county, within two years prior to filing the information, the defendant committed an assault and battery upon the person of Clark S. Baker, and that at the time of the assault and battery he intended to kill said Baker."

The evidence is not in the record, and we can not say that the instruction is incorrect; it may have been proper under the evidence adduced. We regard this instruction as a correct general statement of the law in a case which might well have been made under the issue, and it assumes to be no more. If the accused desired a more specific instruction, he should have asked it. It is well settled that a case will not be reversed

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Morey *et al.* v. Ball.

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where an instruction is correct in so far as it assumes to state a general rule; if a defendant desires a more specific instruction he must ask it.

Judgment affirmed.

Petition for a rehearing overruled.

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No. 7651.

**MOREY ET AL. v. BALL.**

**INJUNCTION.—*Supplemental Complaint.—Practice.***—Where a party, after filing his complaint, files a supplemental complaint seeking to obtain an injunction, and the court issues an order without notice, and upon motion refuses to dissolve the injunction, and an appeal is taken from such order, it will be considered as an injunction and not a mere temporary restraining order.

**SAME.—*Demurrer.***—Where the defendant appears without notice and files a demurrer to such supplemental complaint, the court does not err in issuing an injunction without first passing upon the demurrer, as a demurrer to such pleading is unknown to the practice.

**SAME.—*Fraudulent Conveyance.—Judgment.***—A creditor under our statute may enjoin his debtor from transferring his property fraudulently without first obtaining a judgment.

**SAME.—*Partnership.—Averment in Complaint.***—Where two persons constitute one firm, and are members of another, and an action is brought to restrain them from fraudulently disposing of the property of the latter firm, it is error to enjoin them from disposing of the property of the former firm, or of their individual property, without any averment that they are threatening to do so, and when such order is made it is error to refuse, upon motion, to modify it as to the property of such last named firm, or their individual property.

From the Tippecanoe Circuit Court.

*J. M. LaRue* and *F. B. Everett*, for appellants.

*R. P. Davidson*, *J. C. Davidson* and *W. D. Wallace*, for appellee.

**BEST, C.**—The appellee brought this action against Robert Morey, Gardner Ball and Seneca Ball. The complaint consisted of two paragraphs. The first averred, in substance,

90	450
126	104
90	450
131	37
90	450
134	619
90	450
149	442
90	450
170	137

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*Morey et al. v. Ball.*

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that Robert Morey, Gardner Ball and Seneca Ball, on the 4th day of September, 1878, were partners doing business under the firm name of "Robert Morey & Co.," and that Robert Morey and Gardner Ball were partners doing business under the firm name of "Morey & Ball"; that on said day said firms borrowed of the First National Bank of Lafayette, Indiana, \$5,000, for which said firms made their note, payable ninety days after date with interest at the rate of ten per cent. after maturity, with the appellee as their surety; that said firms, and each of them, failed to pay said note at maturity, and that the appellee, on the 14th day of December, 1878, was compelled to and did pay said note, the principal and interest then amounting to \$6,000; that neither of said firms nor any member of them has repaid said money, but that the same, with the interest thereon, is due and remains wholly unpaid.

The second paragraph of the complaint averred the same facts except that it was averred that the money was borrowed by the firm of Robert Morey & Co., and that the firm of Morey & Ball and the appellee executed said note as co-sureties for said first named firm. This complaint was filed on the 14th day of December, 1878, and on the 20th day of the same month the appellee filed a supplemental complaint.

This complaint averred, in substance, that the firm of Robert Morey & Co. was formed on the 1st day of September, 1876, for the purpose of doing a commission business in grain in the city of Lafayette and elsewhere, and at once entered upon the business of buying, selling and shipping grain to distant markets, in which business it is still engaged; that at the time said partnership was formed said Robert Morey and Gardner Ball were doing the same kind of business under the firm name of "Morey & Ball," at a different place in the city of Lafayette, and that they continued said business until the 1st of March, 1878, when they quit business and proceeded to wind up the affairs of said firm; that the firm of Robert Morey & Co. had not more than \$3,000 with which to do business, and that the appellee, who is the father of Seneca

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*Morey et al. v. Ball.*

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Ball, continually aided said firm by endorsing its paper ; that said firms borrowed of the First National Bank of Lafayette, Indiana, on the 7th day of August, 1878, \$5,000 ; on the 24th of August, 1878, \$5,000 ; and on September 4th, 1878, \$5,000, for each of which sums said firms made notes, with the appellee as surety, payable ninety days from date, with interest at ten per cent. after maturity, with attorney fees and without relief, etc. ; that said firms, and each member thereof, failed to pay said notes at maturity, and that the notes given for the first two sums borrowed remain wholly unpaid ; that the appellee, as surety of said firms, was compelled to and did pay upon the note given for the last sum borrowed \$5,011.10 on the 14th day of December, 1878, and that the same, with interest thereon, is due and remains unpaid ; that after the firm of Morey & Ball ceased to do business, its funds to the amount of \$15,000 were put in the firm of Robert Morey & Co., and were used by the last named firm as a part of its capital stock, but that said firm gave the firm of Morey & Ball credit for the amount received upon its books, and said firm of Morey & Ball claims to be a creditor of the firm of Robert Morey & Co. ; that the assets of said last named firm, consisting of a lot and warehouse thereon in the city of Lafayette, a large amount of grain, mostly in New York, bills receivable and book accounts, do not exceed \$23,500, and that the debts of said firm, aside from the claim of Morey & Ball, amount to \$21,000 ; that neither of the defendants has any property subject to execution aside from his interest in the firm of Robert Morey & Co., and that each is insolvent ; that Robert Morey and Gardner Ball, with full knowledge that the assets of said firm were not sufficient to pay its debts and to repay Morey & Ball the amount said firm had so advanced, conspired to withdraw from said firm the amount advanced by the firm of Morey & Ball, and for that purpose, on the 23d day of November, 1878, drew out of the First National Bank of Lafayette \$1,413.08, deposited in the name of Robert Morey & Co., used \$500 of the money and deposited the bal-

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*Morey et al. v. Ball.*

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ance in said bank in the name of Morey & Ball, and since said date the funds of Robert Morey & Co. have been deposited in said bank by said Robert Morey and Gardner Ball to the credit of the firm of Morey & Ball, without the knowledge or consent of Seneca Ball; that since November 23d, 1878, said Morey and Gardner Ball have wrongfully appropriated to their own use \$5,000 of the money of said firm, \$2,500 of which has been appropriated since the institution of this suit; that said Robert Morey has recently threatened and declared that he would sell and dispose of the property of said Robert Morey & Co. as rapidly as possible, and appropriate the same to the use of said Morey & Ball, in repayment of the money put into said firm, and would put and keep the same beyond the reach of the creditors of the firm of Robert Morey & Co., and would, at all hazards, repay to Morey & Ball the amount put by that firm into the firm of Robert Morey & Co.; that on the 18th day of December, 1878, Robert Morey drew \$6,000, the money of Robert Morey & Co., but deposited in the name of Morey & Ball, from the First National Bank of Lafayette, and with it left for Chicago, for the purpose of selling all the grain and produce of the firm of Robert Morey & Co. in Chicago, and of selling all in New York, with a view of appropriating the money to the use of Morey & Ball, so that it may forever be kept from the creditors of the firm of Robert Morey & Co.; that said Gardner Ball, on the day before, sold 4,600 bushels of corn, the property of said last named firm, for \$1,285, and refuses to deposit or to account for the money, but has appropriated it to his own use, with a view of keeping the same from the creditors of said firms; that unless said Robert Morey and Gardner Ball are at once enjoined from disposing of the assets of said firm, or of collecting money belonging to it, or of paying out its funds, the assets of said firm will be speedily converted into money and forever lost to the creditors of said firm, and that an emergency exists to issue a restraining order at once, and without notice, restraining the said persons, and

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*Morey et al. v. Ball.*

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each of them, from disposing of any of the property of said firm, or of the so-called funds of the firm of Morey & Ball; that it has been agreed by the defendants to wind up the business of the firm of Robert Morey & Co. as soon as the books can be examined and the accounts of the partners determined, and as that is nearly done no harm will result to appoint a receiver, etc. Wherefore, etc.

This complaint was verified, and as soon as filed Robert Morey and Gardner Ball appeared and filed a demurrer to the supplemental complaint on the ground that the same did not state facts sufficient to constitute a cause of action against them. The court, without passing upon the demurrer, issued an order restraining Robert Morey and Gardner Ball from disposing of any of the property of said firm, or of any property belonging to them individually, or of any belonging to them as members of the firm of Morey & Ball, until the further order of the court, and the cause was set for hearing on the 26th day of December following.

The next day Robert Morey and Gardner Ball moved the court to modify its order so as not to embrace the property owned by them individually or the property belonging to the firm of Morey & Ball. The various motions made to thus modify the order were overruled and exceptions were saved. Thereupon the court overruled the demurrer to the supplemental complaint, after which the same was amended by averring that the several acts charged to have been done were done with the intent to defraud the creditors of the firm of Robert Morey & Co., and the several acts threatened were about to be done with like intent, all of which was duly verified.

The appellants thereupon filed an answer of two paragraphs on behalf of Robert Morey & Co. The first was a general denial, and the second was a set-off. Thereafter they moved the court to dissolve the injunction generally, which was overruled. They then moved the court to dissolve the injunction as to the property of the firm of Morey & Ball, and

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severally moved the court to dissolve the injunction so far as it affected the individual property of each of them. These motions were overruled, and they appeal, assigning these various rulings as error.

The parties to this record disagree as to the character of the order made by the lower court. The appellants insist that it was a temporary injunction, and contend that it was error to issue it while a demurrer was pending to the complaint. The appellee, on the other hand, contends that it was a restraining order, and that it was proper to issue it without first disposing of the demurrer. This order was the only one ever made in the case, and as the appellee insists that it is still in force, and as the appellants appeal from it as an injunction, we think we must thus regard it. Thus regarded, we think there was no available error in issuing it without first disposing of the demurrer filed. The demurrer in this case was filed to the supplemental complaint. Our statute authorizes such pleading to show facts which occurred after the former complaint was filed. 2 R. S. 1876, p. 83, section 102.

Such supplemental complaint does not supersede the original, but both stand and constitute the complaint.

As such pleading only constitutes a part of the complaint, a demurrer to it is unknown to our practice, and the court was authorized to disregard it. This is what was done, and in this no error was committed.

The appellants do not claim that the court erred in overruling the demurrer, but in granting the injunction before the demurrer was passed upon. If the demurrer had been directed to the entire complaint, it would have presented no question concerning the injunction, as the complaint was unquestionably good for the money due. If good for any purpose, it was sufficient to withstand the demurrer. *Searle v. Whipperman*, 79 Ind. 424.

Granting the injunction without passing upon the demurrer, had it been thus directed, would, at least, have been ir-

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regular, perhaps erroneous; but, as the demurrer was itself unauthorized, no error was committed in proceeding without passing upon it.

It is next insisted that the court erred in granting and in refusing to dissolve the injunction, on the ground that a general creditor, before judgment, can not enjoin his debtor from disposing of his property. This is the rule in the absence of a statute. High Injunctions, secs. 131, 326.

Our statute, however, provides, among other things, that "where it appears in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property." 2 R. S. 1876, p. 93, section 137.

Under this statute, a creditor before judgment may restrain his debtor from disposing of his property. In such case, it must appear that such debtor threatens or is about to dispose of his property with intent to defraud his creditors. This fact, we think, sufficiently appears. It is true that the mere act of selling the property of Robert Morey & Co., and placing the proceeds on deposit in the name of Morey & Ball, in payment of money claimed to be due that firm, does no injury to the creditors of the other firm; nor does the act of Robert Morey and Gardner Ball in retaining the proceeds of such property operate as a fraud upon such creditors, for the reason that the money is still in the hands of the debtors. So long as the appellees' debtors have the money, it is immaterial to the creditors whether they claim it as the money of Morey & Ball or Robert Morey & Co. Both firms were, and each member was, liable for the money due the appellee. If it were averred that Morey & Ball had creditors, or that either member of the firm had creditors, a different question would arise, but as this is not averred it must be assumed that there are no creditors of either class, and hence the money thus held either

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Morey *et al.* v. Ball.

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belongs to Robert Morey & Co., or to these persons as individuals, and as they are liable to the appellee he is in no wise injured because they claim it as the money of Morey & Ball rather than as the money of Robert Morey & Co. It is, however, averred that they were conspiring together for the purpose of putting this property beyond the reach of the creditors of Robert Morey & Co., and this, if established, was sufficient to warrant the order.

The motion to modify the order so as not to prohibit the appellants from transferring the property of Morey & Ball, or from transferring their individual property, should have been sustained. Nothing was averred in the complaint justifying any such order, and the mere fact that the firm of Morey & Ball, or the members of the firm, may not have any property, as is suggested by the appellees, did not authorize the injunction, nor will the suggestion justify its continuance. The firm of Morey & Ball, and each member of the firm, was liable for the appellee's claim, but this fact alone did not authorize the order; it was necessary that it should also appear that the members of this firm were threatening or were about to dispose of this property fraudulently.

A receiver was appointed, but as no appeal was taken from the order no question arises upon it.

This disposes of the material questions in the record, and as the court erred in refusing to modify the order in the particulars above named, the order in that respect should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the order in this case be modified so far as not to embrace the firm property of Morey & Ball and the individual property of each member of said firm, at the appellees' costs, and that in all other respects it be affirmed.

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Stewart v. Beck et al.

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No. 10,651.

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## STEWART v. BECK ET AL.

**ESTOPPEL.**—*Plea of.*—*Location of Gravel Road.*—*Injunction.*—A plea of estoppel must clearly and fully set forth all the facts essential to the existence of an estoppel, leaving nothing to intendment; and an answer of estoppel to an action to enjoin the location of a gravel road on a line different from that ordered by the board of county commissioners must show, with sufficient certainty, the acts constituting such estoppel.

From the Boone Circuit Court.

*W. H. Thompson*, for appellant.

*C. S. Wesner* and *R. W. Harrison*, for appellees.

**ELLIOTT, J.**—The appellant's complaint seeks an injunction preventing the construction of a gravel road across his land, and alleges that the order of the board directing the opening and improvement of the road provided that it should be located on a line dividing sections 25 and 30 and 26 and 35 in township 19; that one of the appellees is the engineer of said road, and that the other is the contractor, and that they are opening and improving the road on a line different from that ordered, in this, that they are not constructing it upon the line dividing the sections named, but are constructing it wholly south of the section lines. The third paragraph of the answer, with needless prolixity, sets forth the proceedings before the commissioner, together with much evidence, and alleges that the engineer and viewers, at the time of surveying the line of the road, set stakes along the center of the proposed road, "and did proceed to construct the same on the line designated by such stakes; that appellant was one of the petitioners for the road; that he was present when the road was located through his premises and during the time the work was in progress, and gave his full consent thereto, and with knowledge of all the facts permitted the work to progress until more than half completed.

The answer assumes to plead an estoppel, and it is a familiar rule of pleading, that such a plea must clearly and fully

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Hall, Executor, v. The Pennsylvania Company.

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set forth all the facts essential to the existence of an estoppel, leaving nothing to intendment. *Robbins v. Magee*, 76 Ind. 381; *Lash v. Rendell*, 72 Ind. 475. Measured by this rule, the answer is bad. It does not deny the statement of the complaint that the road was being opened entirely south of the line prescribed by the commissioners' order, and it fails to show, with sufficient certainty, any act of appellant estopping him from enjoining appellees from taking part of his land not embraced within the order of the board. It does not aver with that precision which is necessary in such a case as this, that the appellant consented to setting the stakes on a line different from that designated in the order. Had it done this with sufficient particularity, it may be that it would have been good. As the answer now stands, it simply charges that the appellant consented to the location of the road, and this must be construed to mean not that he consented to setting the stakes, but to the location described in the order.

Judgment reversed.

Petition for a rehearing overruled.

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No. 9,542.

HALL, EXECUTOR, v. THE PENNSYLVANIA COMPANY.

COMMON CARRIER.—*Special Contract.—Evidence.—Variance.*—Where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common-law duty of such carrier, if the evidence show that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal, and the plaintiff can not recover.

From the Superior Court of Allen County.

A. A. Chapin, W. H. Coombs, R. C. Bell and S. L. Morris,  
for appellant.

J. Brackenridge and J. R. Carey, for appellee.

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100	459
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Hall, Executor, v. The Pennsylvania Company.

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Howk, J.—In this case the appellant, executor of George Glatte, deceased, the plaintiff below, alleged, in substance, in his complaint, that the appellee, on the 16th day of July, 1877, and long prior thereto, was a common carrier of goods, to carry for hire the goods of all persons, upon request, from Philadelphia, Pennsylvania, to Kendallville, Indiana; that on said day the appellant's testate delivered to the appellee, as such carrier, in good order, fifteen barrels of sugar, the goods of such decedent, to be carried by appellee safely from Philadelphia to Kendallville, then and there to be delivered to the said George Glatte, then in life; that appellee then and there received said goods to be safely carried and delivered as aforesaid, for a reasonable reward to be paid therefor by the said Glatte; that appellee failed and neglected safely to carry and deliver said goods to said Glatte, in his lifetime, nor, since his death, had appellee delivered the same to appellant, but that the same had been wholly lost, for want of due care and preservation by appellee, to the damage of the appellant in the sum of \$500, for which he, as executor, demanded judgment.

The cause was tried by the court, and a finding was made for the appellee, the defendant below, and over the appellant's motion for a new trial, the court rendered judgment against him for the appellee's costs.

In this court the only error assigned by the appellant is the overruling of his motion for a new trial; and the causes assigned for such new trial were, that the finding of the court was not sustained by the evidence, and that it was contrary to law. The single question for decision in this case, therefore, may be thus stated: Is there legal evidence in the record of this cause which tends to sustain the finding of the trial court on every material point?

The cause was submitted to the court for trial, on an agreed statement of facts, in substance, as follows:

"It was agreed by the parties that the sugar mentioned in the complaint was, at the time the same was received by the

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Hall, Executor, v. The Pennsylvania Company.

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defendant for carriage, as stated in the complaint, of the value of \$400. And thereupon the following agreed statement of facts was also submitted by the parties as evidence in said case, to wit: Come now the parties, plaintiff and defendant, and hereby agree that the following are all the facts in this case, and that the same shall be submitted to this court for decision and judgment, upon the facts herein below set forth, to wit:

“The goods described in the complaint, being fifteen barrels of sugar, were purchased by the decedent in the city of Philadelphia, in the month of July, 1877. The defendant is and was at the time this cause of action accrued a common carrier, operating the Pittsburgh, Fort Wayne and Chicago Railway, extending through Allen county, Indiana, and also the ‘National Line’ of freight cars, which, among other places, ran between the city of Philadelphia and the village of Kendallville, Indiana. On the 16th day of July, 1877, the sugar so purchased was delivered in good order to the defendant, as such common carrier, at the city of Philadelphia, and a contract, a copy of which is hereto attached, marked ‘Exhibit A,’ and made a part of this agreed statement of facts, was made and entered into by and between the decedent and the defendant, wherein the defendant, upon the conditions therein named, agreed for a reasonable consideration to carry such sugar from the city of Philadelphia to the village of Kendallville.

“The sugar so received under said contract was by defendant, in the due course of transportation, safely and without delay carried as far as the Pennsylvania Company’s yard in the city of Pittsburgh, county of Allegheny, State of Pennsylvania. While there, and before there was any negligent delay on defendant’s part, the property, with a large amount of other goods, then and there in the custody of the defendant, was violently taken possession of by a riotous mob, composed of persons, some of whom had until then been employees of the defendant and were such employees, unless, by

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their conduct, they ceased to be such. Defendant used all means in its power to retain and then to regain possession of said property, that it might preserve it, and continue its transportation, and to this end used not only such of its employees as remained in its employment, but through the proper legal authorities invoked the aid of the city of Pittsburgh and of the State of Pennsylvania, and even the presence and efforts of a large force of police furnished by the city, and of armed militia sent by the Governor of the State, were insufficient to protect such property, and it was destroyed by fire lighted by the mob on the 21st day of July, 1877.

"It is further agreed that the defendant was fully provided with all the facilities necessary to the prompt carriage of its freights and transaction of its business, and that the sugar was taken from its control and retained by a force it could not resist. The mob was occasioned by a strike among the defendant's employees, who had been joined by a large number of persons sympathizing with the strikers."

This agreed statement of facts was signed by the attorneys of the respective parties.

The material parts of the contract, or bill of lading, marked "Exhibit A," and made a part of the agreed statement of facts, were in substance as follows:

"National Line. Fast freight line, *via* Pennsylvania Railroad.

"Freight shipped by the National Line reaches all points west, northwest and southwest, *via* the Pennsylvania Railroad and its connections. Its transporting facilities are ample and unsurpassed by any other fast freight or dispatch line. The cars of this line are constructed to run through from Philadelphia to the west and northwest, without transfer. All claims promptly adjusted by the agents."

(Here follow the names of the officers and of a long list of agents.)

"Received, Philadelphia, July 16th, 1877, of Harrison, H. & Co., the following packages (contents unknown), in ap-

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parent good order. Marks: G. C. G., Kendallville, Ind., G. C. Glatte, fifteen bbls. sugar, to be transported by the National Line, and the steamboats, railroad companies and forwarding lines with which it connects, to \_\_\_\_\_, within \_\_\_\_\_ days (Sundays and days of shipment and delivery excepted), upon the following conditions:

“That the said National Line and the steamboats, railroad companies and forwarding lines with which it connects and which receive said property, shall not be liable for any loss or damage, however accruing, enunciated below, viz.: \* \* \* \* nor for loss or damage on any article of property whatever, by fire or other casualty, while in transit or while in depots or places of transshipment, or at depots or landings at points of delivery. \* \* \* \* In witness whereof,” etc.

This was all the evidence given in the cause, and upon this evidence the trial court found for the appellee, the defendant below. We are of opinion that the finding of the court was clearly right. It will be observed that in his complaint, the substance of which we have given, the appellant counted exclusively upon an implied contract or agreement of the appellee, as a common carrier, and sought to recover damages for an alleged breach of its common-law duty as such carrier, in the transportation of his decedent's sugar. No reference whatever was made by the appellant in his complaint to any written contract or bill of lading executed by the appellee to the decedent in his lifetime, for the carriage and delivery of his sugar. In *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518, this court held that a suit against a carrier for a breach of his contract as such, under the code, must be brought upon the bill of lading, where such a bill is given and embraces the terms of the contract. The court said: “Here, there was a bill of lading, embracing all the terms of a contract touching the subject-matter involved—a contract, by the written terms of which the parties were bound, and their rights and liabilities to be determined—a contract of a high and fixed character, which could not, as we have

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seen, be varied by parol evidence; and we are clear that it should have been referred to in, and filed with, the complaint. As this case stood, if the fact of the written contract had been disclosed, it would seem that parol evidence must have been excluded, because of the written, and the written, because not sued on."

So, in *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339, it was held that where, in an action against a common carrier to recover damages for delay in the transportation and delivery of live-stock, the complaint is based upon a special contract, the plaintiff could not recover upon an implied contract to carry in a reasonable time, or for a breach of the legal duty of the defendant as a common carrier. "In other words," the court said, "there is a fatal variance in this case between the contract alleged and the case which the jury found to have been proved."

So, also, in *Lake Shore, etc., R. W. Co. v. Bennett*, 89 Ind. 457; S. C., 6 Am. & Eng. R. R. Cases, 391, where, in the first paragraph of his complaint the appellee counted exclusively upon an implied contract of the appellant, as a common carrier, and sought to recover damages for an alleged breach of its legal duty, as such carrier, in the transportation of his cattle, and the evidence showed that the cattle were received and carried by the appellant under a special contract, this court held, that there could be no recovery by the appellee on the first paragraph of his complaint. The court said: "When, therefore, the court found, as it did, that appellee's cattle were delivered to and received by the appellant under a special contract, which was at the time duly executed by the parties, it would seem that such finding would be an end of the case, as stated in the first paragraph of the complaint, and that no recovery could be had thereon. \* \* \* \* \* The appellee could only recover, if he recovered at all; upon and in accordance with the allegations of his complaint; and as the facts specially found by the court present an entirely dif-

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Hall, Executor, v. The Pennsylvania Company.

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ferent case from that stated by the appellee, in either paragraph of his complaint, we think that the court, as a conclusion of law upon its findings of fact, ought to have found for the appellant, the defendant below."

And so we think in the case at bar. When the evidence showed, as it did, that the decedent's sugar was delivered to and received by the appellee for transportation and delivery, under the terms of a special contract, there could be no recovery by the appellant in this action, because the special contract was not sued on, and because of the fatal variance between the case made by the allegations of the complaint and the case made by the evidence. Nor will it obviate this difficulty to say that, by the agreed statement of facts, the parties submitted to the court for trial a different case from the case stated in appellant's complaint; for, in that view of the case before us, it would be an agreed case, under the provisions of section 386 of the civil code of 1852, or section 553, R. S. 1881. "In an agreed case, no motion for a new trial is necessary, but the party aggrieved must except to the decision of the trial court, upon the agreed statement of facts, and unless the record shows that an exception was taken to the decision at the proper time, it will present no question for the decision of this court. This point is settled by the decisions of this court. *Fisher v. Purdue*, 48 Ind. 323; *Manchester v. Dodge*, 57 Ind. 584." *Lofton v. Moore*, 83 Ind. 112.

In this case the appellant did not except at the time to the finding or decision of the trial court upon the agreed statement of facts. In any view of the case, therefore, we are of opinion that there is no error in the record of this cause which would authorize the reversal of the judgment below.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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Loshbaugh v. Birdsell.

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No. 10,089.

## LOSHBAUGH v. BIRDSSELL.

**WITNESS.**—*Opinion.*—*Evidence.*—*Utility of Highway.*—In a proceeding to establish a highway, on trial in the circuit court, the opinion of witnesses that such highway will or will not be of public utility is not admissible in evidence, even when the facts upon which the opinion is based are stated.

From the St. Joseph Circuit Court.

*A. Anderson*, for appellant.

*L. Hubbard*, for appellee.

**BEST, C.**—This proceeding was instituted by the appellant and others for the location of a highway across the appellee's land. An order was made locating the road and awarding damages to the appellee. An appeal was taken to the circuit court, and upon the trial the jury, to whom the issues were submitted, returned a verdict that the highway would not be of public utility. A motion for a new trial made by the appellant was overruled, and judgment was rendered upon the verdict.

The ruling upon the motion for a new trial is assigned as error. This motion embraces several causes, none of which are relied upon except the ruling of the court in permitting a couple of witnesses to express an opinion that the road would not be of public utility. These witnesses were called by the appellee, and after they had testified to the location of the road, the nature of the soil over which it was to be constructed, the amount of grubbing and grading required, the fences to be removed, the probable expense, the proximity of the proposed highway to other highways, the probable amount of travel, and the number of persons whom it would accommodate, the appellee propounded to one of them this question: "From the facts stated do you consider that the proposed highway would be of public utility?" The appellant objected to this question, on the ground that it called for the opinion of the witness upon the issue submitted to the jury. The objection was overruled, and the witness answered "No; I do not think it would be a road of public utility." The same

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133	448

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151	659

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164	864

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167	133
168	216

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question was propounded, the same objection made, and, in substance, the same answer given by the other witness. Did

Did the court err in the admission of this testimony? The general rule is that the opinion of witnesses is not admissible in evidence. *Evansville, etc., R. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Bissell v. Wert*, 35 Ind. 54.

There are, however, many exceptions to this rule. In *Greenleaf on Evidence* it is said: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct, and bearing, whether friendly or hostile, and the like." See 1 *Greenl. Ev.*, 13th ed., note to sec. 440, p. 495, also *Johnson v. Thompson*, 72 Ind. 167 (37 Am. R. 152); and it may be added that whenever the subject-matter to which the testimony relates can not be reproduced or described to the jury precisely as it appeared to the witness, and the facts upon which an opinion is sought are such as men in general are capable of understanding, then the witness may express his opinion upon such facts. *Commonwealth v. Sturtivant*, 117 Mass. 122 (19 Am. R. 401); 1 *Whart. Ev.*, section 512, and authorities there cited.

This case, however, does not seem to us to fall within any exception to the general rule. There was no difficulty in putting the jury in possession of all the facts pertinent to this enquiry, and they are supposed to be as well qualified to form an opinion from the facts as the witnesses themselves. In *Whitmore v. Bowman*, 4 Greene (Iowa), 148, it is said that "in no case should a witness be permitted to express an opinion as evidence, where the jury, to whom the facts are submitted, are supposed to be equally well qualified to form an opinion;" and this rule was approved by this court in *Bissell v. Wert*, *supra*. The appellee relies upon the case of *Bennett v. Meehan*, 83 Ind. 566 (43 Am. R. 78). That case is unlike this one. The question there was what effect, if any, the drainage of wet land would have upon the public health of the community. The question falls clearly within the exceptions to the

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general rule, that a witness can not state an opinion. The matter sought to be elicited could not be specifically stated, nor accurately described to the jury, and, therefore, the opinion of the witness was admissible in evidence. The court, in support of its conclusion that the question was proper, cites this rule from 1 Whart. Ev., section 512: "So an opinion can be given by a non-expert as to matters with which he is specially acquainted, but which can not be specifically described," and cited many cases illustrating it. The case at bar is different. There was no difficulty, as before stated, in proving the facts to the jury, and hence this case is not within the rule that governed the other case. In *Hagaman v. Moore*, 84 Ind. 496, this court held that the opinions of witnesses were not admissible to prove the benefits to a given parcel of land by the location of a highway across it, but the same must be proved by the facts and circumstances. The question in that case is analogous in principle to the question in this case, and the court, in discussing it, said that the jury, in determining the question, must judge, as they would of the public utility of the proposed way, by the facts and circumstances, without the aid of the opinion of witnesses. This, we think, must be the rule in this class of cases. The admission of these opinions also seems to trench upon the rule that witnesses can not usurp the province of the jury, which they would do were they allowed to express opinions upon the very issue upon trial. This can not be done in cases where opinions are admissible. This case, it seems to us, falls within the general rule, and that the opinion of witnesses is not admissible to prove that a proposed highway will or will not be of public utility. The court erred in the admission of this testimony, and for this error the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to grant a new trial.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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 Strecker *et al.* v. Conn.
 

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No. 9,070.

## STRECKER ET AL. v. CONN.

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**PRACTICE.—Demurrer.—Defect of Parties.**—A demurrer for a defect of parties can be sustained only when such defect is apparent in the complaint; otherwise the question must be presented by answer.

**SAME.—Answers to Interrogatories.**—Answers by a jury to interrogatories are to be considered as an entirety, and judgment should be rendered on the general verdict, unless such answers are irreconcilable therewith.

**PARTNERSHIP.—Evidence.—Contract of Copartnership.**—In an action against the members of a partnership, the original articles of copartnership are admissible in evidence against one becoming a member of such firm subsequent to its formation.

**SAME.—Liability of One Holding Himself Out as Partner.—Estoppel.**—One who knowingly permits himself to be held out to the world as a partner precludes himself from asserting, as against a party contracting with the firm in the belief that he is a partner, that he is not in fact a member of the copartnership, and it is not necessary for the party seeking to bind such partner to show that he gave credit to the firm on account of such partner's financial ability.

**SAME.—Notice of Withdrawal of Member.**—A member of a copartnership must, on his withdrawal therefrom, in order to shield himself from liability to one who gives credit to the partnership in the belief that he is still a member, give general notice thereof; former customers of the firm are entitled to actual personal notice.

**SAME.—Question of Fact.**—The notice which a retiring partner is required to give must be a reasonable one, and whether such an one is so given is a question of fact for the jury.

**SAME.—General Notoriety.**—Where no notice of the withdrawal of a member from a partnership is publicly given, the retiring member can not escape liability for a firm debt to one who had no actual notice thereof, but who had previous knowledge of the persons composing the firm, from the mere fact that his withdrawal was of general notoriety.

**PRACTICE.—Non-Joinder of Co-obligor.—Waiver.**—Where one jointly liable with another goes to trial without answering the non-joinder of a co-obligor, he can not, after verdict, raise that question.

From the Pulaski Circuit Court.

*D. P. Baldwin* and *D. D. Dykeman*, for appellants.

*S. T. McConnell* and *T. J. Tuley*, for appellee.

**ELLIOTT, J.**—It is only where a defect of parties appears on the face of the complaint that a demurrer for that cause will lie; in other cases the question must be presented by answer.

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Answers returned by a jury to interrogatories addressed to them are to be taken together, and not separately.

Judgment will always be pronounced upon the general verdict, unless the findings in the answers to the interrogatories are utterly irreconcilable with the general verdict.

In the present case, the general verdict was for the appellee, and the question first presented in argument is, whether the answers to interrogatories entitled the appellant to a judgment notwithstanding the general verdict. Taking the answers as an entirety, there is no invincible repugnancy between them and the general verdict, and the court below did right in denying appellants' motion for judgment upon them.

Contradictory answers may nullify each other, but they do not overturn the general verdict. It is only where the facts stated in the answers affirmatively make a case against which the general verdict can not stand, that judgment will go upon the answers; this result does not follow where the findings are contradictory and self-destructive.

Appellant Strecker became a member of the partnership known as the People's Bank; the partnership had existed for some time prior to the time the appellant entered it, and had been doing a general banking business. On the trial the appellee was permitted to give in evidence the original articles of copartnership executed before appellant became a partner. In this there was no error. This instrument was relevant and material, for it tended to show the character of the business of the partnership into which Strecker entered, and the duties and obligations of the partners.

It is contended that the bill of exceptions is not properly in the record, and there is ground for this contention; but, as there seems to be some confusion and some misunderstanding as to the effect of an agreement made between counsel, we have deemed it proper to consider the bill as if properly filed.

If one knowingly permits himself to be held out to the world as a partner, he becomes liable to those who deal with the firm in the belief that he is a partner, as fully as if he

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were in fact a partner. It is not necessary for the person asserting the claim to show, as counsel contend, that he gave special credit to "the financial ability" of the one so held out as a partner. A person who suffers himself to be placed before the world as a partner precludes himself from asserting, as against third persons, that he was not in fact a member of the partnership. *Uhl v. Harvey*, 78 Ind. 26.

One who has been a member of a partnership, and has been so advertised to the world, owes it to the community to give notice of his withdrawal from the firm; failing in this, he stands bound to those who, in the belief that he is still a member of the partnership, give it credit. This duty to give general notice is due to the public, it is not confined solely to former customers of the firm; former customers of the firm are entitled to actual personal notice. *Backus v. Taylor*, 84 Ind. 503; *Uhl v. Harvey*, *supra*; *Southwick v. McGovern*, 28 Iowa, 533; *Ketcham v. Clark*, 6 Johns. 144; S. C., 5 Am. Dec. 197.

Where no notice of withdrawal is publicly given, and no actual notice of that fact is brought home to one who had previous knowledge of the persons composing the firm, the retiring partner can not escape liability upon the sole ground that it had become matter of general notoriety that he had withdrawn. The fact that the withdrawal was generally known in the community may, perhaps, be considered in conjunction with other evidence as tending to charge those dealing with the partnership with notice of the withdrawal; but the mere fact that the withdrawal was a matter of general notoriety will not supply the place of public notice, where there is no visible change in the business, in the title of the firm, or in its advertisements. *Pitcher v. Barrows*, 17 Pick. 361; *Holdane v. Butterworth*, 5 Bosw. 1; *Gorham v. Thompson*, 1 Peake (3d ed.), 60; *Graham v. Hope*, 1 Peake (3d ed.), 208, n.; *City Bank, etc., v. McChesney*, 20 N. Y. 240; *Lovejoy v. Spafford*, 93 U. S. 430. It was said by Chief Justice SHAW, in *Pitcher v. Barrows*, *supra*: "Mere notoriety may exist, and yet the party dealing with such firm may not be acquainted with it;

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*Shaffer et al. v. Shaffer.*

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and where it is in the power of one party, and his duty, to give public and explicit notice of a fact affecting the rights of others, and he does not do it, it ought not to be assumed upon doubtful grounds of presumption." The case from which we have quoted goes so far as to deny the competency of evidence of notoriety, but upon that point the authorities are in conflict; we, however, are not required to give an opinion upon that precise point, and, therefore, intimate none.

The notice which a retiring partner is required to give must be a reasonable one, and it was proper to submit the question, whether a reasonable notice was given by appellant, as one of fact, to the jury.

We do not think it necessary to decide the question whether, where the contract of partnership expressly stipulates that the withdrawal of a partner shall not dissolve the firm, it is nevertheless dissolved by such withdrawal; for, if it be conceded that the court was in error on this point, it is still very clear that no harm resulted to the appellant.

The evidence supports the verdict. If one jointly liable with another, or others, goes to trial without answering the non-joinder of his co-obligors, he can not after verdict raise that question.

Judgment affirmed.

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No. 9,581.

SHAFFER ET AL. v. SHAFFER.

**PARTITION.—Widow.—Antenuptial Agreement.—Answer.**—In an action by a widow against her deceased husband's children by a former marriage, for a partition of the land of which he died seized, in which she claims one-third in fee and an additional third for life, an answer which merely alleges that such widow and her deceased husband made an antenuptial contract, whereby her interest in his land, in case she survived him, should be limited to one-third for life, is insufficient upon demurrer, un-

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*Shaffer et al. v. Shaffer.*

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less it also avers that she has no title to the one-third in fee other than such as she claims as widow.

**SAME.**—*Interest of Widow in Husband's Lands.*—*Antenuptial Contract.*—Where an antenuptial contract is thus made, limiting the interest of the wife, in case she survives the husband, to one-third of his land for life, she is not entitled also to one-third in fee.

**SUPREME COURT.**—*Evidence.*—*Record.*—Where a question depends upon the evidence, the record must, as a general rule, contain all the evidence, in order to present the question; but where a question does not depend upon the entire evidence, and it affirmatively appears that all the evidence upon which it does depend is in the record, the question is properly presented.

**NEW TRIAL.**—*Partition.*—*Finding.*—*Evidence.*—Where the court in a partition suit awards the plaintiff too much of the common property, a motion for a new trial on the ground that the finding is not supported by the evidence will present the question.

From the St. Joseph Circuit Court.

*D. J. Wile*, for appellants.

*L. Hubbard* and *W. G. George*, for appellee.

**BEST, C.**—This action was brought by the appellee against the appellants for the partition of eighty acres of land in St. Joseph county, Indiana.

The complaint consisted of two paragraphs. The first averred that the land belonged to David Shaffer, who died intestate in March, 1879, leaving the appellee his widow, without children, and the appellants' children by a former marriage; that prior to their marriage they entered into an antenuptial contract, which is fully set forth, whereby, in case she survived him, she became entitled to one-third of said land for life; that as widow she was entitled to an additional third, and the appellants owned the remainder; that it could not be divided, etc.

The second paragraph of the complaint averred that the appellee was the owner of one undivided one-third in fee; that she owned an additional undivided third for life, and the appellants owned the residue; that it was not susceptible of division, etc.

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The appellants joined in an answer of two paragraphs. The first was a general denial and the second was special. A demurrer for want of facts was sustained to the second paragraph of the answer and an exception reserved.

The issues were tried by the court and a finding made that the appellee was the owner of the undivided five-ninths of said land, and that the same was not susceptible of division without injury, etc. Over a motion for a new trial because the finding was not sustained by sufficient evidence, and was contrary to law, judgment was rendered upon the finding.

The errors assigned are, that the court erred in sustaining the demurrer to the second paragraph of the answer, and in overruling the motion for a new trial.

The second paragraph of the answer, which was limited to the third of the land claimed in fee, merely averred the execution of the antenuptial contract mentioned in the first paragraph of the complaint, alleged that by its terms the appellee's interest in such land was limited to a third for life, and that after the death of said decedent the appellee accepted and enjoyed the property to which she was entitled by virtue of such contract.

This paragraph was manifestly insufficient. It stated no fact in bar of the case made by the second paragraph of the complaint. This paragraph did not state how the appellee acquired a third of the land in fee, and if she acquired it otherwise than as the surviving wife of said decedent, the antenuptial contract did not impair her title to it, though it limited her right as widow to one-third of the land for life. For aught that is averred she may have acquired it by purchase from the heirs of said decedent. As the paragraph was not limited to the first paragraph of the complaint, and as it was not averred that the appellee had no title other than such as she acquired by the contract and as widow, it was insufficient, and the demurrer was properly sustained.

The averment that she received the property mentioned

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in the contract added nothing to the paragraph. If she were entitled to a third in fee in addition to a third for life, as averred, the reception of the property to which she was entitled by the contract did not estop her from claiming a third in fee. The acceptance of the property did not involve an election between inconsistent rights, and, therefore, could not preclude her from claiming other property which also belonged to her. *O'Harrow v. Whitney*, 85 Ind. 140.

The paragraph was insufficient and the demurrer properly sustained.

The motion for a new trial is based upon the ground that the finding was not supported by sufficient evidence and was contrary to law.

The appellants insist that the evidence failed to show any title in the appellee to a third of the land in fee, and hence the finding of the court awarding her such interest was not sustained by the evidence.

The appellee insists that the record does not contain all the evidence, and, therefore, this question can not be considered. The bill of exceptions contains all the evidence except that offered to show that the premises were indivisible, and in lieu of this the appellants filed a stipulation that the finding upon such question was supported by sufficient evidence. The record does not contain all the evidence given in the cause, but all given upon the question sought to be presented. This affirmatively appears, and is, in our opinion, enough to present the question. The general rule undoubtedly is, that where a question depends upon the evidence the record must contain all the evidence, but this is not the rule where the question does not depend upon the entire evidence. The rule is thus stated in *Wells v. Wells*, 71 Ind. 509, "in all cases where the entire evidence is necessary, in order to present fully the questions arising on the motion for a new trial, the evidence must be in the record. But this is not the case where the question presented is of such a character that

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it can be determined as well without the entire evidence as with it."

In this case the question presented can be determined as well without the omitted evidence as with it, and hence no reason exists why it should not be considered. Indeed, if it were here, it could not possibly affect this question, because it was given upon an entirely different subject. The record, therefore, presents the question.

The undisputed evidence in the record shows that the only title the appellee had to the land in question was such as she acquired by the antenuptial contract, and such in addition, if any, as she was entitled to as the widow of such decedent. If she were not entitled to any interest as widow in addition to one-third for life, secured to her by such contract, the finding was not sustained by the evidence and a new trial should have been granted. This contract was before this court in the case of *Shaffer v. Matthews*, 77 Ind. 83, where it is fully set forth, and to which reference is made. It was held in that case that the appellee's rights were limited to the provisions made for her by the contract, and that she was not entitled to take in addition thereto under the law. This case is decisive of the question against her. It therefore follows that the court erred in awarding her more than one-third of the land for life, and for this error the judgment should be reversed.

It is proper, however, to say that the above case was decided after the judgment in this case was rendered.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion that the judgment be and it is hereby reversed at the appellee's costs, with instructions to grant a new trial and for further proceedings.

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Wilson v. Murray et al.

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No. 10,043.

WILSON v. MURRAY ET AL.

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**REPLEVIN BAIL.**—*Subrogation.*—*Assignee.*—*Judgment in Force.*—The sale of the real estate of a replevin bail to satisfy the judgment is a compulsory payment thereof, within the meaning of section 1214, R. S. 1881, and the judgment will remain in force for the use of such bail; but it is otherwise when real estate, owned by the bail when he replevied the judgment, but since conveyed, is sold to satisfy the judgment. In such case, the property so taken, as between it and property of a principal in the judgment subject to the lien thereof, would be secondarily liable, and the person who owned it when so taken would be subrogated to the rights of the judgment plaintiff against the property primarily liable.

**SAME.**—*Fraudulent Conveyance.*—Where real estate, subject to the lien of a judgment, is sold as the property of a replevin bail who has theretofore conveyed it, and such bail assigns the judgment, his assignee can not, as against the purchaser of the real estate of the principal in the judgment, be regarded as having the rights, under section 1214, of a replevin bail who has paid the judgment. Nor does an adjudication, in an action by creditors against such replevin bail, that the conveyance is fraudulent and void as to them, affect the rights of the bail or his assignee.

**SAME.**—*Injunction.*—An injunction will lie by the purchaser of the real estate of a principal in a judgment to prevent the sale of such real estate on execution issued by the assignee of the replevin bail, where property, once owned by such bail and subject to the lien of the judgment, has been sold to satisfy the judgment after he had conveyed the same, although the conveyance has been adjudged to be fraudulent as to the bail's creditors.

From the Randolph Circuit Court.

W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

I. P. Gray, P. Gray, S. Colgrove and S. M. Whitten, for appellees.

**BLACK, C.**—The conclusions of law in a special finding, assigned as error, are alone discussed by counsel in their briefs.

The suit was brought by the appellant, Rufus A. Wilson, against the appellees, Ralph V. Murray, sheriff of Randolph county, John P. Peters and Henry DeBolt, for an injunction against the sale on execution of certain land owned by the appellant in said county. The special finding is quite long; we will state, with some condensation, the facts found:

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On the 28th of October, 1876, one Fahnestock recovered in the court below a judgment against one William P. DeBolt and one George W. DeBolt for \$501.18, and costs, and on the 6th of November, 1876, the appellee Henry DeBolt became replevin bail for the stay of execution on said judgment.

Said George W. DeBolt, being the owner in fee simple of said land, sold it on the 9th of November, 1876, to one Runyan, to whom said George W. DeBolt and his wife conveyed it by general warranty deed, which purported to be signed by the grantors on the 28th of September, 1876, when it was signed and acknowledged by them before a notary public, in whose certificate of that date it was certified, in due form, that the deed was acknowledged on that day. The name of the grantee, for which a blank had been left, was inserted in the deed, and it was delivered to him on the 9th of November, 1876. The deed was duly recorded on the 10th of November, 1876. Said Runyan, on the 20th of December, 1878, sold and conveyed said land to the appellant for a valuable consideration.

Before the commencement of this suit, the appellant had no other knowledge or notice of the date of the sale and conveyance to Runyan than that the deed was dated and acknowledged on the 28th of September, 1876, and that it was recorded on the 10th of November, 1876; and he had no other knowledge or notice of the date of the delivery of the deed to Runyan, and no knowledge or notice that his name was not written in the deed September 28th, 1876, and no actual notice that said Fahnestock judgment was rendered before the sale and conveyance to Runyan.

December 7th, 1877, one Johnson recovered a judgment against said Runyan and said George W. DeBolt, in said court, for \$413.68 and costs, which was a lien on said land. Under an execution issued on said Johnson judgment, said land was sold by the sheriff and was purchased by Johnson, on the 6th of April, 1878, for the full amount of his judgment. Before the expiration of the year for redemption,

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Johnson sold and assigned his certificate of purchase to the appellant for value, and after the expiration of said year, the land not having been redeemed, the sheriff executed his deed for said land to the appellant, which was duly recorded December 4th, 1879.

When the appellee Henry DeBolt became replevin bail, as aforesaid, and for more than two years before that time, he was the owner in fee simple of certain other land in said county. On the 9th of December, 1876, said Henry and his wife conveyed his said land by deed of general warranty to their son, George M. DeBolt.

November 19th, 1877, execution issued on said Fahnestock judgment, and the sheriff, having failed, upon demand, to receive money or property from said William P. DeBolt or said George W. DeBolt, made demand of said Henry, and upon his refusal levied upon, advertised, and on the 2d of February, 1878, sold Henry's said land on said execution for the full amount of said Fahnestock judgment to said Fahnestock, to whom the sheriff made a certificate of purchase, and the sheriff made return, which was duly recorded, that he could find no property of said William P. DeBolt or said George W. DeBolt whereon to levy, and that the judgment had been made by sale of the real estate of said Henry, replevin bail. Said real estate so sold to Fahnestock not having been redeemed, and said Fahnestock having assigned his certificate to one John Fisher, the sheriff, after the expiration of the year for redemption, executed his deed to said Fisher for said real estate so sold to Fahnestock.

On the 28th of February, 1879, the appellee Henry DeBolt, said replevin bail, sold, and by entry upon the order-book assigned, said Fahnestock judgment to the appellee John P. Peters. Afterward, on the order of said Peters, the clerk issued execution on said Fahnestock judgment to the use of said Peters against said William P. DeBolt and said George W. DeBolt, the judgment defendants, to the appellee Ralph V. Murray, sheriff, who served said execution on said

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William P. DeBolt and said George W. DeBolt, and demanded of each of them money or property to satisfy it, and they having refused, and the sheriff being unable to find any property of said William P. DeBolt, or any personal property of said George W. DeBolt, whereon to levy, levied said execution on said real estate theretofore conveyed, as aforesaid, by said George W. DeBolt, to said Runyan, and by him to the appellant; and at the commencement of this suit said sheriff was about to advertise, and was threatening to advertise and sell, said real estate to pay said Fahnstock judgment, and said Peters was ordering and directing the sheriff to do so, and the sheriff would do so unless enjoined.

When said Fahnstock judgment was rendered, said William P. DeBolt did not have, and he has not since had, any property whatever; and said George W. DeBolt has no property subject to execution, and unless said Fahnstock judgment is a lien upon the real estate so held by the appellant, there is no property out of which said judgment, or any part of it, can be made.

On the 27th of December, 1876, John Fisher recovered a judgment against said Henry DeBolt and others; and on the 24th of April, 1877, the First National Bank of Winchester recovered a judgment against said Henry and others, and one Moorman recovered three judgments, in each of which said Henry was a defendant. Said judgments were so recovered by Fisher, the First National Bank and Moorman in the court below, and aggregated \$7,675.40, besides costs, and each of them was for a debt existing before the execution of said conveyance by said Henry and wife to said George M. DeBolt.

May 11th, 1877, said Fisher, the First National Bank of Winchester and Moorman instituted an action in said court against said Henry DeBolt, his wife and said George M. DeBolt, to set aside said conveyance to said George M. DeBolt, as fraudulent and void as to the creditors of said Henry, and to subject the real estate so conveyed to sale to pay said judgments in favor of said Fisher, said Bank and said Moorman,

the complaint charging that said conveyance was made to said George M. DeBolt by Henry and his wife with the fraudulent intent to cheat, hinder and delay the creditors of said Henry ; that it was made without any consideration ; that said George M. DeBolt paid no consideration and received the conveyance with knowledge of the fraudulent intent of said Henry. Said cause was tried on the 11th of March, 1878, and the court found that the allegations of the complaint were true, and adjudged that said conveyance, so made December 9th, 1876, to said George M. DeBolt be set aside, that said judgments in favor of Fisher, the First National Bank and Moorman were liens on said real estate so conveyed to said George M. DeBolt, and that it be sold to pay said judgments. The appellant was not a party to said last mentioned action.

On the 28th of September, 1878, a copy of the decree so rendered therein was issued to the sheriff, with executions on said judgments in favor of said three plaintiffs in said action, and said executions were levied upon the real estate so conveyed to said George M. DeBolt, which the sheriff advertised, and on the 7th of December, 1878, sold, under said decree and executions, for \$1,000 to said Fisher, who paid said sum to the sheriff, and received the sheriff's certificate of purchase ; and after the expiration of a year, the real estate not having been redeemed, the sheriff executed his deed to said Fisher for said real estate. Said judgments against said Henry and others remain unpaid, except said sum of \$1,000. And in the special finding before us the court found that said real estate was conveyed by said Henry and wife to said George M. DeBolt with the fraudulent intent to cheat, hinder and delay the creditors of said Henry, and that said George M. DeBolt received the conveyance with knowledge of said fraudulent intent ; that said Henry, at the time of his making said conveyance, did not have left sufficient property subject to execution to pay his debts then existing, and at the commencement of said action to set aside said conveyance

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had no property subject to execution ; that said Henry never stood by when or before the appellant was buying said real estate from said Runyan, and did not advise or encourage or request the appellant to purchase said real estate, and had no notice that appellant was about to buy, or intended to buy, said real estate from Runyan until after the purchase had been fully made, or that said George W. DeBolt had sold and conveyed to Runyan until after the 28th of February, 1879, when he, said Henry, assigned said Fahnestock judgment to the appellee Peters.

The court concluded, as matter of law, that the Fahnestock judgment was and is a lien on the real estate of said George W. DeBolt, so conveyed to Runyan and by him to the appellant ; that it was a lien on said real estate of the appellee Henry DeBolt, replevin bail, which was afterward sold as aforesaid to pay said judgment ; that Fahnestock having been paid and satisfied in full by the sale of said real estate, which was owned by said Henry when he became replevin bail, and by the sale thereof as the property of said replevin bail, said Henry was entitled to the benefit of the payment by the sale of said real estate ; that said Fahnestock judgment was not satisfied and discharged by said payment by said sale, but it remained in full force and effect against said William P. DeBolt and said George W. DeBolt, for the benefit of said Henry ; that after said Fahnestock judgment had been so paid said Henry was entitled to execution on said judgment to his use, and the appellee Peters is entitled to have said real estate, so conveyed to appellant, sold by the sheriff upon execution to satisfy said judgment ; and that the appellant is not entitled to an injunction against the appellees, or either of them, restraining them, or either of them, from selling said real estate to pay and satisfy said judgment.

We are unable to concur in the conclusion reached by the learned judge of the circuit court. The Fahnestock judgment was a lien upon the land of the judgment defendant George W. DeBolt, conveyed by him to Runyan, and by him

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to the appellant, and the lien was paramount to that of said Johnson judgment. It was a lien also on said real estate of the appellee Henry DeBolt, replevin bail, and the lien was paramount to that of either of said judgments recovered against said Henry and others.

If Henry had not conveyed his said real estate, and it had been sold on execution for the satisfaction of the Fahnestock judgment, this would have been a compulsory payment of the judgment by the replevin bail, within the meaning of the statute, section 676, code of 1852, section 1214, R. S. 1881, and under the statute the judgment would not have been discharged by such payment, but it would have remained in force for the use of the bail, and might have been prosecuted to execution for his use or for the use of his assignee.

If the property taken to satisfy the judgment was not the property of the replevin bail at the time it was taken, such satisfaction of the judgment would not be a payment by the bail, though said property had been his at a former time and while his subject to the lien of the judgment; for in such case he would part with nothing for the satisfaction of the judgment. In such case, the property so taken, as between it and property of a defendant in the judgment subject to the lien thereof, would be secondarily liable, or liable as surety, and the person who owned it when so taken would be subrogated to the rights of the judgment plaintiff against such property so primarily liable. If, by reason of covenants of the replevin bail, he should be compelled to reimburse the person whose property was so taken, the bail would be entitled to relief on equitable principles against property so primarily liable, if not entitled to the relief provided by the statute for a replevin bail compelled to pay the judgment. Whether his mere liability to so reimburse his grantee would constitute payment within the meaning of the statute need not be discussed here.

After the real estate which the replevin bail owned when he became bail, on which from that time forward the judgment was a lien (sec. 427, Code of 1852, sec. 697, R. S. 1881), and

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which he thereafter conveyed to his son, had been sold to satisfy the Fahnestock judgment, said conveyance to said son was, at the suit of certain junior judgment creditors of the replevin bail, adjudged fraudulent and void as to his creditors; and the court below, in the case at bar, found that said conveyance was made with intent to defraud said creditors, without any consideration, and that the grantee had notice of the fraudulent intent. Under the form of the conclusions of law, it does not appear how the court regarded said proceeding between the parties to that conveyance and said creditors as affecting this case, or how far the court was influenced by its own finding of facts in relation to said conveyance, additional to its finding concerning said judgment avoiding it. Some stress seems to be laid upon the fact that the land was sold under the Fahnestock judgment as the land of the replevin bail. The judgment was a lien on that land by virtue of the statute, before it was conveyed by the replevin bail. The grantee took subject to that judgment without regard to the question whether the conveyance was fraudulent or not, and the judgment plaintiff's proceeding by execution against the property as property of the replevin bail, ignoring his grantee, did not annul or set aside the deed of conveyance as between the bail and his grantee, or affect their contract relation, or make the replevin bail the owner in fact of the property at the time it was taken on execution. If, at the time of the sale under the execution, the replevin bail had no property in fact in what was sold, he could not claim that he paid the judgment. It was proper, not only in the sale on execution, but also before and after such sale, to ignore the grantee George M. DeBolt. He had no title, apparently good, as against the judgment. He could not put the validity of the execution sale in controversy by showing himself a purchaser without fraud. The conveyance to the son was afterward set aside as fraudulent. This was not necessary to the full relief of Fahnestock; with the question whether there was fraud or not he had no concern.

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Did the adjudication in said action to set aside said conveyance, or the finding in the case at bar that it was fraudulent, affect the question of the rights of Henry or his assignee, as against the appellant?

It is a familiar principle that the statute renders a fraudulent conveyance void only as to the creditors of the grantor, and that the conveyance is good and effectual between the parties, whose relative rights are not affected by the statute.

In *State Bank v. Davis*, 4 Ind. 653, Davis was surety on certain notes for Webb and Shoemaker to Spofford, Tilletson & Co., and received a mortgage of real estate from the principals, Webb and Shoemaker, to indemnify him as such surety. A judgment was obtained on said notes, and execution thereon was returned *nulla bona*. Rochester became the assignee of the judgment, and filed a bill in chancery against said Davis and others, and obtained a decree for the sale, to satisfy said judgment, of certain land which had been conveyed by said surety, as having been conveyed by him to defraud his creditors, and said land was accordingly sold and was bought by said Rochester. The mortgaged land having been sold to the State Bank by the assignee of Webb and Shoemaker, after the mortgage had been recorded, and the State Bank having been a party to said suit wherein said conveyance had been so set aside as fraudulent, Davis brought his action to foreclose the mortgage and to subject the land so conveyed to the State Bank to the payment of the claim on which he was surety, on the ground that said claim had been paid by him by reason of the decree in favor of Rochester subjecting said land so fraudulently conveyed to sale. It was held that the action would lie. It was there contended, on behalf of the State Bank, that the fraudulent conveyance of Davis divested him of all title to the land conveyed by him and estopped him from claiming that the payment of the debt by the sale of that land was a payment by him. But it was said by the court that Davis was not seeking, by his suit for foreclosure, to set aside his own fraudulent act; that it was set aside and

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annulled against his will by the court; that the question was not whether a fraudulent conveyance is valid between the parties to it, nor whether, in case of its being annulled at the suit of a creditor, the grantor is entitled to a surplus remaining after payment of the debt, but it was whether, when the debt had been paid by a sale of the property, the grantor was entitled to a credit for the payment.

In the subsequent action between Davis and the State Bank the former was held to be entitled, as against the latter, to claim that it was the property of Davis that had paid the judgment assigned to Rochester, it having been so adjudged in an action to which both Davis and the State Bank were parties, and the debt, to pay which Davis was permitted to claim the property, was applied as his property being the debt to pay which it had been adjudged liable as his property in the former action.

Now, the question in the case at bar is not whether Henry DeBolt, as against another party to the action in which his conveyance was adjudged fraudulent against his will at the suit of his judgment creditors, is entitled to claim that it was his property that paid the \$1,000 upon the judgments of said creditors, but the question is, whether because of said adjudication, or because, in the case at bar, his conveyance has been found to be fraudulent, he can claim against the appellant that it was said Henry's property that paid the Fahnestock judgment. As before said, it was not needed, in order to subject Henry's said land to the Fahnestock judgment, that Henry's conveyance should be treated as fraudulent; and prior to this action the property so conveyed by Henry has not been adjudged liable as his property to pay the Fahnestock judgment, and sold for that purpose under such an adjudication. The appellant was not a party to the suit in which said conveyance was annulled, and the grantee, said George M. DeBolt, is not a party to this suit. The rights of the appellant could not be adjudicated in that action, and

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the rights of said grantee can not be affected by this action. To adjudge in the present case that the conveyance of said Henry was fraudulent and void, and to permit him to base any claim on that fact would be to rescind his conveyance without his grantee's being a party to the action, and to permit the grantor to derive an advantage by setting up his own fraud. The judgment in said suit of his judgment creditors set his conveyance aside only in favor of his creditors, not in his favor, nor in favor of the Fahnestock judgment, nor against the appellant. As to all persons, except his creditors, the conveyance stands valid and effectual. A fraudulent conveyance "is void only as against creditors; and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent, and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditor, and the conveyance stands." 1 Story Eq. Jur., section 371.

The grantee, George M. DeBolt, so far as the adjudication in said action against him, or any adjudication that could be made in the case at bar, is concerned, has the right to establish that he is entitled to subrogation in an action against the appellant. For aught that can be determined in this action, said George M. DeBolt may be entitled to relief. But there can be but one person so entitled as against the appellant. It therefore does not appear that said Peters, the assignee of said Henry, is so entitled.

The judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, and the cause is remanded, with instructions to state conclusions of law in accordance with this opinion, and to render judgment accordingly.

Petition for a rehearing overruled.

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Thornton v. Burr.

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No. 10,344.

## THORNTON v. BURR.

**PLEADING.**—*Written Agreement.*—*Breach.*—*Demurrer.*—A complaint, counting upon a written agreement, but not alleging any breach of the agreement by the defendant, and showing that the agreement was incapable of execution by any of the parties, is bad on demurrer for the want of sufficient facts.

From the Henry Circuit Court.

*J. Brown and W. A. Brown*, for appellant.

Howk, J.—This was a suit by the appellee against the appellant, in a complaint of two paragraphs. In the first paragraph the appellee alleged, in substance, that on the 10th day of June, 1879, he and the appellant, and one Needham Sanders, entered into a written agreement, in substance, as follows: "Whereas, the undersigned, in pursuance of an agreement entered into between us, on the 3d day of August, 1871, purchased and caused to be assigned to us the following judgments and decrees against the Northwestern Turnpike Company, viz.:" (Description omitted.) "All of which were rendered in the common pleas court of Henry county, on the 28th day of April, 1870, and assigned to the said Burr and Thornton on the 6th day of March, 1872; and that prior to and since the execution of said agreement, and embraced in the terms thereof, we have purchased and had assigned to us the following judgments against said company, to wit:" (Description omitted), "and some additional claims, all of which will fully appear upon the order-books of said Henry Common Pleas Court: Now it is hereby agreed between us, that the above named judgments in favor of William Grose and Christian Ehmen have been fully paid to us by said turnpike company; that there have been paid to us on the John Ehmen judgment certain named amounts on certain named dates; and that there have been paid on the judgment in favor of Francis Thornton certain specified sums at certain named dates.

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"It is further agreed between us, as to the amounts advanced by us, under the agreement above mentioned, that James N. Thornton has advanced the sum of \$1,050, Lycurgus L. Burr has advanced \$650, and Needham Sanders \$500; and that, upon sale by the sheriff, on execution of said judgments and decrees against the company, whatever amount is realized from such sale, after payment of the costs thereof, shall be applied *pro rata* to the payment of said claims on that basis, and if there shall be realized from said sale more than enough to pay said sums (amounting in all to \$2,200), the remainder shall be applied to the remainder of the indebtedness due said Burr and Sanders from said company; that it is further expressly understood and agreed, that said sum of \$1,050, shall be taken to be a full and final settlement of all claims, dues and demands held by said Thornton against said Sanders, Burr and the Northwestern Turnpike Company, or either of them, or by them, or either of them, against him; and it is further agreed, that the execution now in the hands of the sheriff shall be returned, and another execution, for the joint benefit of said Burr, Thornton and Sanders, shall be issued, and that the costs of the suit now pending for injunction in the Henry Circuit Court shall be paid out of the proceeds of the sale on execution, and said suit is to be dismissed in accordance with this agreement."

After setting out such written agreement, the appellee further alleged in the first paragraph of his complaint that the appellant had not kept and performed said agreement, but had violated and broken the same, in this, that, after the execution of said agreement, the parties, Thornton, Sanders and Burr (said execution having been returned to the clerk's office), applied to the Henry Circuit Court for leave to have another execution issued for their joint benefit as agreed upon, which leave was denied by the court, and thereupon they brought suit, at the November term, 1881, of said court, claiming and asking to be subrogated to the rights of certain named mortgagees in a certain mortgage, executed by the

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Northwestern Turnpike Company, to secure certain debts of such company, which were the same debts set forth in said agreement, which the said Burr, Thornton and Sanders had paid, and demanding the foreclosure of said mortgage against said turnpike company and the sale of the mortgaged property, which said suit was brought and prosecuted by them jointly, in lieu of having said joint execution issued; that such proceedings were had in said suit as resulted in a judgment, on January 4th, 1882, in favor of said Sanders for \$569.45, and in favor of appellant for \$797.72, and a decree foreclosing such mortgage against said company; that an execution was duly issued on such judgment and decree to the sheriff of Henry county, and the property of said company was advertised and sold, on February 4th, 1882, to the appellee for \$1,486, being the amount of said judgments, interest and costs; that appellee paid the amount of his bid to the sheriff, except the amount due said Sanders, who receipted the execution in full of his portion of said judgment and decree, upon payment to him of his *pro rata* share thereof under said agreement; that the appellant had received the full amount of said judgment and interest due him, and wholly failed and refused to pay or account to appellee for his portion thereof; and that, under said agreement, the *pro rata* share of each of the said parties, in the amount bid, would be as follows: Appellee, \$403; appellant, \$651; and Sanders, \$310. Wherefore appellee demanded judgment against appellant for \$200, and other proper relief.

In the second paragraph of his complaint, the appellee alleged that on February 4th, 1882, appellant was, and then was indebted to appellee in the sum of \$200, upon an account for money had and received for appellee's use from the Northwestern Turnpike Company, on sale by the sheriff of Henry county of said company's property on execution, etc. Wherefore, etc.

Appellant's demurrer to each paragraph of the complaint having been overruled, he then answered by a general denial.

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Thornton v. Burr.

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The issues joined were tried by the court, and a finding was made for appellee in the sum of \$198.57; and, over appellant's motion for a new trial, judgment was rendered on the finding.

In this court appellant has assigned as errors the decisions of the circuit court in overruling his demurrer to each paragraph of the complaint, and in overruling his motion for a new trial.

We regret that the appellee's learned counsel have not favored this court with a brief or argument in support of the rulings of the trial court, especially so, because, as it seems to us, the judgment below can not be sustained. In such a case, it is hardly fair, either to the trial court or to this court, for the successful party below to abandon his cause on appeal, and allow this court to find out, if it can, the grounds upon which he recovered his judgment. We are of opinion that the first paragraph of appellee's complaint did not state facts sufficient to constitute a cause of action in his favor and against the appellant. We have given a full summary of the facts alleged by appellee in this first paragraph, as constituting his supposed cause of action. It counts upon a written agreement between the appellee, the appellant, and a third person, but it avers no breach of this agreement on the part of appellant. It shows that the agreement was not kept or performed by any of the parties thereto; but it does not show that the non-performance of the agreement was caused, in any manner, by the fault of the appellant. It goes further, we think, and shows beyond a peradventure that the agreement in question was incapable of execution by any or all of the parties thereto, by the appellee as well as the appellant; and that, although all the parties joined in an attempt to carry out the agreement, yet they failed in this attempt without any apparent fault on the part of the appellant.

The first paragraph of the complaint goes still further, we think, and shows clearly and conclusively, as we read its averments, that the appellee had no claim whatever, either

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Wright v. Fansler.

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legal or equitable, upon any part of the proceeds of the subsequent sale of the Northwestern Turnpike. When the parties ascertained that their written agreement could not be executed according to its terms, it is shown by the complaint that they all joined in a suit to enforce their respective claims against the turnpike company. In this suit the appellee failed to recover any sum whatever, while the appellant and Sanders each recovered judgment for their respective claims, substantially as recited in the written agreement. Execution was issued on this judgment in favor of the appellant and Sanders, and the turnpike was sold thereunder for the amounts due them respectively, and costs. These facts are stated, in substance, in the first paragraph of the complaint, and they show very clearly, as it seems to us, that the appellee has no cause of action against the appellant for any part of the proceeds of the sale of the turnpike. The court erred, we think, in overruling the demurrer to the first paragraph of complaint. We need not, therefore, consider or decide any question arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed with costs, and cause remanded, with instructions to sustain the demurrer to the first paragraph of complaint.

90	492
137	987
90	492
131	234
90	492
140	305

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No. 9670.

## WRIGHT v. FANSLER.

**JUSTICE OF THE PEACE.**—*Entry of Judgment in Criminal Cases.*—Where there is no statute prohibiting, a justice of the peace may enter judgment in favor of the defendant, in a criminal prosecution, at any time after it is rendered.

**SAME.**—*Rights of Defendant.*—A defendant, acquitted of a criminal charge, can not be deprived of his rights by the failure of the justice of the peace to enter of record the judgment of acquittal at the time it was rendered.

**SAME.**—*Statute on Subject of Entering Judgments.*—The statute on the subject of entering judgments by justices of the peace applies only to civil proceedings.

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**MALICIOUS PROSECUTION.**—*Effect of Acquittal.*—A judgment of acquittal is *prima facie* evidence of innocence.

**INSTRUCTIONS.**—*Construction.*—Instructions are to be taken as an entirety, and are not to be judged by detached sentences.

From the Cass Circuit Court.

*M. Winfield* and *Q. A. Myers*, for appellant.

*D. B. McConnell*, for appellee.

**ELLIOTT, J.**—The questions in this case arise on the ruling denying the appellant a new trial.

The action is to recover damages for a malicious prosecution instituted against the appellee by the appellant. On the trial, the former introduced in evidence the record of a justice of the peace, showing his arrest, the hearing and acquittal upon a charge of larceny preferred against him by the latter; and the justice by whom the judgment of acquittal was rendered testified, on cross-examination, that although the judgment was pronounced on the 17th day of September, 1879, it was not entered of record for nearly two years afterwards. The appellant contends that the recording of the judgment by the justice was void, and that it was error to admit the record in evidence. In support of this contention several decisions are cited, wherein it is held that a justice must enter of record his judgment within four days after it is pronounced; but these decisions were all made in civil proceedings, and we are not willing to extend them to criminal prosecutions as against one who relies upon the justice's judgment of acquittal as establishing his innocence of a charge preferred against him. An accused, who has had a judicial investigation of a charge against him, and received a judgment of acquittal, ought not to be deprived of its benefit because of the failure of the justice to perform his duty by entering it of record. The reasons which require the recording and signing of a judgment in ordinary civil actions do not apply to criminal prosecutions, and the statute in terms applies only to civil proceedings. Independently of statute a justice may, at any time, enter his judgment of record.

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*Matthews v. Houghton*, 11 Maine, 377; *Gray v. Cookson*, 16 East, 13; *Selwood v. Mount*, 9 C. & P. 75. And surely he ought to have this right in criminal prosecutions, where no statute restricts it, and in cases where one accused of crime and acquitted invokes the benefit of his judgment. We need not enquire, and do not decide, whether a justice can enter a judgment at a time subsequent to its rendition for the purpose of subjecting an accused to punishment, for that question is not before us.

The appellant complains of the ruling of the court denying him the right to read in evidence the record of a replevin action brought by him against the appellee. Conceding, but not deciding, that this evidence was in itself competent, it is clear that no harm was done appellant by its exclusion, for the reason that there was no dispute at the trial as to the title to the property. It was conceded by appellee that appellant had secured the property by the action of replevin, and the record would have proved no more.

The court charged the jury that the discharge of the appellee by the magistrate was *prima facie* evidence of his innocence of the charge against him, but that it was not evidence that the person who made it did it without probable cause. This instruction was certainly as favorable to the appellant as he had any right to ask. The only question in our minds is, whether it was not more favorable than he had a right to have given the jury. 2 Greenl. Ev. 455; Bigelow Torts, 196-203; 1 Am. Lead. Cases, 269.

In the eighth instruction, the court correctly stated the elements which should be considered in estimating damages, and added: "You are only limited in extent by the amount demanded by the plaintiff in his complaint, which is \$5,000, beyond which you can not go; but you may, if you see proper, find in a much less sum; in fact you may find in any sum from one cent to \$5,000." Appellant singles out the first clause of the first sentence and urges several objections against it. This course is not permissible. Instructions are not to be judged

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by detached clauses or sentences, but are to be taken as entireties, and if correct when thus considered, they will be upheld. We have no doubt that the instruction under immediate mention, taken as it must be as a whole, correctly stated the law to the jury.

The first instruction given at the request of the appellee is substantially the same as the one first noticed, and is certainly quite as favorable to the appellant as he could ask.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—Counsel in their brief on the petition for a rehearing assert that we did not properly construe the record, and we have again examined it. We find that the counsel are in error. The appellee, in answer to appellant's questions on cross-examination, fully and broadly admitted that the ownership of the property had been fully settled in the replevin action, and we were correct in saying that there was no dispute as to that question. The introduction of the record in that action would have proved no more than the appellee admitted, and there was, therefore, nothing more than a harmless error, if, indeed, error at all, in excluding the record in the replevin proceedings.

Petition overruled.

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No. 10,711.

THE SCHOOL CITY OF SOUTH BEND v. JAQUITH, TRUSTEE.

SCHOOL REVENUE.—*Dog Tax Fund.*—*Township.*—*City.*—*Trustee.*—Where a township embraces within its limits a city, the whole of the surplus fund in excess of \$50 arising from the registration of dogs, must, under the act of April 13th, 1881, Acts 1881, p. 395, section 2651, R. S. 1881, be transferred to the school revenue of the township, and no part of it belongs to the school revenue of the city, and the trustee of the township is not authorized to apportion it between the township and the city.

From the St. Joseph Circuit Court.

90	495
142	672
90	495
150	171
150	172

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The School City of South Bend v. Jaquith, Trustee.

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*A. Anderson*, for appellant.

*L. Hubbard*, for appellee.

BEST, C.—The School City of South Bend brought this action against Andrew J. Jaquith, trustee of the township where the city is situated, to recover a portion of the surplus fund which had accumulated from the registration of dogs.

The court found the facts specially, stated its conclusions of law, and rendered judgment for the appellee. The appellant excepted to the conclusions of law, and assigns this ruling as error.

The court found that the city of South Bend is situated in Portage township, St. Joseph county, Indiana, and that the appellee is now, and was on the 1st day of October, 1882, trustee of said township; that on the said day he had in his hands the sum of \$273.80 which he had received for the registration of dogs, which sum was in excess of all orders drawn upon such fund, and in excess of the further sum of \$50; that at that time there were 5,211 children in said city, and within the township outside of said city there were 265 children subject to enumeration for school purposes.

The appellant insists that this sum should be apportioned between the School City of South Bend and the School Township of Portage, in proportion to the number of children in each, and this is the question presented by this record.

The act of April 13th, 1881, which authorized the collection of this fund, and which directs the disposition of the surplus, provides that "when it shall so happen on the first Monday of October of each year, in any township, that said fund shall accumulate to an amount exceeding fifty dollars over and above orders drawn against the same, the surplus above the said fifty dollars shall be paid and transferred to the school revenue of the township, and expended as a part thereof for tuition."

This section in plain and explicit language directs the trustee to transfer the surplus to the school revenue of the town-

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The School City of South Bend v. Jaquith, Trustee.

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ship. Where a township does not embrace within its limits a city or an incorporated town, there is no difficulty in determining the fund to which the transfer is to be made. Where, however, a township embraces within its limits a city, there is more difficulty. In such case each has a school revenue, and the difficulty arises in determining whether both constitute the school revenue of the township, or whether such revenue consists of the fund apportioned to the school township. If both constitute the school revenue of the township, the appellant was entitled to a portion of the surplus; if not, the judgment was right.

A brief reference to the statutes in force upon this subject will enable us to determine this question.

Section 4438 of the R. S. of 1881 provides that "Each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes, by the name and style of the civil township, town, or city corporation respectively," and the trustees of each shall perform the duties of clerk and treasurer for school purposes.

Under this statute, the civil township of Portage embraces within its limits two distinct municipal corporations for school purposes—one the School City of South Bend and the other the School Township of Portage. For school purposes they are distinct and independent corporations—one embracing the territory within the city limits and the other the territory outside the city limits. The trustee of the civil township, by virtue of his office, is treasurer of the school township, and, as such, receives and disburses its funds. The school city has its treasurer, who, in like manner, receives and disburses its funds. These officers are distinct and control separate funds, which are apportioned to their respective corporations at stated times. Section 4486 of the R. S. of 1881 requires the county auditor to make an apportionment of the school revenue to which his county is entitled, to the several

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The School City of South Bend v. Jaquith, Trustee.

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townships, incorporated towns and cities, and the sum so apportioned to each is required to be paid to the treasurer of such township, town or city. In making this apportionment, he must ascertain the amount of congressional township school revenue belonging to each city, town, or township, so as to apportion the other school revenue in such manner as to equalize the apportionment.

Section 4441 requires the trustees of every township, incorporated town, or city to receive the special school revenue belonging thereto, and the revenue for tuition which may be apportioned to his township, town, or city, and to expend the same for the purposes for which they were appropriated.

From these various sections of the statute, it is apparent that these several municipal corporations for school purposes have each a distinct and separate fund. These belong to them as school corporations. Each fund is school revenue, not of the civil township, but of the several school corporations. After as before the apportionment, each fund is school revenue, but after apportionment the fund allotted to the school township becomes "school revenue of the township." It is not so declared by any statute; but school revenue apportioned to a city or town could hardly be denominated "school revenue of the township," and since the statute directs the surplus to be transferred to such fund, it must be that the fund apportioned to the school township is the fund intended. This conclusion is somewhat strengthened by the significant language of the statute. The surplus "shall be paid and transferred to the school revenue of the township." Strictly speaking, this surplus could not be paid to a fund, but it may be transferred, and since this is required the requirement implies that both funds are in the hands of the same officer. Again, the fact that the trustee is not expressly directed to apportion this surplus, and does not possess the data for doing so, strongly supports our conclusion that the statute does not require it.

The fact that the bulk of this fund comes from the people living within the city, and that it seems inequitable not to al-

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Wallace *et al.* v. Lawyer *et al.*

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low them to share it, is, at most, a mere circumstance to be considered; but this can not control the express language of the statute. The Legislature had the undoubted power to dispose of this surplus, and having done so, by requiring it to be transferred to the school revenue of the township, when that fund is ascertained construction ceases.

For these reasons, we are of opinion, that the court did not err in its conclusions of law, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

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No. 10,031.

WALLACE ET AL. v. LAWYER ET AL.

PRINCIPAL AND AGENT.—*Ratification.—Judgment, Assignment of.*—If the owner of a judgment (holding either by legal or equitable title) receives, and with a knowledge of the facts retains, the price paid for an unauthorized assignment of the judgment, made in the name of the owner by one who assumed to have authority thereto, the assignment is thereby ratified.

From the Hamilton Circuit Court.

*W. Garver, R. Graham, D. V. Burns and C. S. Denny*, for appellants.

*T. J. Kane, T. P. Davis, A. F. Shirts, W. R. Fertig and G. Shirts*, for appellees.

WOODS, C. J.—Action by the appellees to enjoin the collection by the appellants of a certain judgment of the Marion Superior Court, rendered in favor of Andrew Wallace against the appellees, and afterwards assigned by the said Andrew to his wife and co-appellant.

It was admitted on the trial "that on the 31st day of August, 1878, Joseph M. Wallace executed an assignment of

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*Wallace et al. v. Lawyer et al.*

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said judgment in proper form, on the proper record, in the name of said Andrew Wallace to Asher G. Walton," but it is claimed that Joseph M. Wallace had no authority to make the assignment, and that, for the want of evidence to show such authority, the motion of the appellants for a new trial should have been sustained.

The evidence shows, or tends strongly to show, that before the execution of the assignment in question Andrew Wallace, in consideration or payment of moneys which he had received of his wife, had sold and transferred to her a stock of groceries, and had executed to her a written assignment of accounts, demands and judgments, including the one in question, and, having thus disposed of his business and property, had gone to a Western Territory to look after mining interests. Of the goods and business thus transferred to her, Mrs. Wallace put her son Joseph M. Wallace in charge, and while so employed he sold and assigned the judgment in question to Walton for the sum of \$100, which he mingled with other moneys received for and applied to the uses of his mother, who, after full knowledge of the facts, made no offer to return the money to Walton, but retains the same, upon the pretence that Walton purchased only as agent for the judgment defendant, and that she is willing to allow the amount as a credit upon the judgment. If it can be said that there is any evidence tending to show such agency on the part of Walton it is slight, and the proof to the contrary is explicit and positive. The assignment of record to Mrs. Wallace was not made until after the entry of the assignment to Walton.

It is clear that the retention of the money received of Walton for the assignment of the judgment, after notice of the facts, constituted a waiver of all right to dispute the validity of the assignment on account of lack of authority of the agent to make it.

Judgment affirmed.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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Sargent *et al.* v. Flaid.

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No. 10,657.

## SARGENT ET AL. v. FLAID.

**SUMMONS.**—*Appearance.*—*Practice.*—An appearance by a defendant to a suit before a justice, and by motion procuring a continuance of the cause, preclude him from afterwards insisting, by a special appearance, that the cause should be dismissed on account of the insufficiency of the summons; nor is a motion to set aside the summons in such case available on appeal in the circuit court.

**SAME.**—*Specific Objections.*—The specific objection to a summons upon a motion to set it aside must be shown.

From the Vigo Circuit Court.

*S. R. Hamill*, for appellants.

*G. W. Kleiser* and *J. H. Kleiser*, for appellee.

**FRANKLIN, C.**—Appellee commenced a suit against appellants before a justice of the peace, on a promissory note for \$100, executed by appellants to one Black, and by said Black endorsed to appellee. A summons was regularly served upon appellants; they appeared before the justice on the return day thereof, and on their motion the cause was continued to a certain time, at which time appellants entered a special appearance, and moved to dismiss the cause on account of the insufficiency of the summons, which was overruled by the justice. They then withdrew their special appearance, and judgment was rendered against them. And appellants appealed to the circuit court, where they again entered a special appearance, and “moved to set aside the summons herein as insufficient,” which was overruled by the court. And by agreement of the parties the cause was submitted to the court for trial. The court found for appellee and rendered judgment accordingly.

The error assigned in this court is that the court below erred in overruling appellants’ motion to set aside the summons as insufficient.

After a full appearance before the justice, and upon their motion procuring a continuance of the cause, appellants

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*Leary et al. v. New et al.*

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could not enter a special appearance and move to dismiss the cause on account of the insufficiency of the summons. The court then had acquired full jurisdiction of their persons by their former general appearance. Nor were they in any better condition when they moved in the circuit court to set aside the summons. These motions, had they any foundation, were made too late to be available. The purpose of a summons is to bring the parties into court, and when that is done the summons has performed its mission.

If these motions had been made in time, no specific objection to the summons is anywhere pointed out, either in the motions, bill of exceptions, or appellants' supersedeas brief (no other brief being on file).

If appellants thought there was any valid objection to the summons, they should have pointed it out. The general objection, that it is insufficient, is too general to be considered. *Campbell v. Swasey*, 12 Ind. 70; *Hadley v. Guttridge*, 58 Ind. 302.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with ten per cent. damages, at the costs of appellants.

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No. 9710.

LEARY ET AL. v. NEW ET AL.

**REAL ESTATE, ACTION TO RECOVER.**—*Title by Sheriff's Sale.*—In an action to recover real estate by a purchaser thereof at a sheriff's sale, against the execution defendant, the plaintiff must show, to support his title, a judgment, execution, sale and deed.

**SAME.**—*Mortgagor.*—A mortgagor in possession can not, after a decree of foreclosure against him, set up a title in a third person or himself to defeat the title of the purchaser of the land under the decree.

**BILL OF EXCEPTIONS.**—*Judgment.*—*Evidence.*—*Presumption.*—Where a bill

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*Leary et al. v. New et al.*

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of exceptions shows an offer of the record of a judgment as evidence, and that an objection thereto was overruled, and immediately thereafter in the bill there appears a transcript of such a judgment, it will be presumed, in the absence of anything to the contrary, that the record of the judgment was read in evidence.

From the Hancock Circuit Court.

*M. Marsh, T. S. Rollins and G. W. Stubbs*, for appellants.  
*J. A. New and J. W. Jones*, for appellees.

ELLIOTT, J.—This action was instituted by the appellees to recover possession of real estate and to enjoin the appellants from removing crops and from cutting timber. The question presented is whether the finding is sustained by sufficient evidence, for, as we understand counsel, all other questions are waived. In support of their case appellees offered a deed executed to them by the sheriff, and also one executed by Mitchell, the assignee in bankruptcy of Thomas J. Leary. The former was admitted, but the latter was excluded on motion of appellants' counsel. It was not necessary for the appellees to support their claim of title by two deeds. If one gave them title no more was needed.

In order to support title under a sheriff's sale, the plaintiff must show a judgment, execution, sale and deed. *Shipley v. Shook*, 72 Ind. 511. This was done in this instance.

Where the bill of exceptions shows an offer of the record of a designated judgment, and that an unsuccessful objection was interposed, and immediately thereafter there appears in the bill a transcript of such a judgment, it will be presumed, in the absence of any contrary showing, that the record of the judgment was read in evidence. The objection, that as the bill of exceptions does not state in express terms that the record of the judgment was read in evidence it can not be considered as having gone to the jury, is entirely too technical to be allowed to prevail.

We do not regard the complaint as averring that appellees' title was founded on the deed of the assignee in bankruptcy, but as alleging that it is one of the evidences of title, and that

## Wagoner v. The State.

the deed on the foreclosure sale is another evidence of title. A man may have different evidences of title and plead them all, if he chooses to do an unnecessary thing, but he need only prove one good and paramount title.

A mortgagor in possession can not, after a decree of foreclosure barring all his rights and equities has been entered, set up title in a third person, or in himself, to defeat the title of the purchaser at the sheriff's sale made on the decree of foreclosure. *Turner v. First National Bank*, 78 Ind. 19.

Judgment affirmed.

No. 10,419.

## WAGONER v. THE STATE.

**STATUTORY CONSTRUCTION.—***Repeal by Implication.—Criminal Law.*—Where a new law covers the whole subject-matter of the former statute, and is intended to supersede it and take its place, the new law repeals by implication the former statute, and, therefore, section 27 of the felony act of June 10th, 1852, was repealed by implication by section 2204, R. S. 1881.

**CRIMINAL LAW.—***False Token or Writing.—Question of Fact.—Motion to Quash.*—The question as to whether the alleged false token or writing, copied in the indictment, is or is not of such a character that a person of ordinary caution would give it credit, is a question of fact and not of law, and is not presented by a motion to quash the indictment.

**SAME.—***Sufficiency of Indictment.*—An indictment for obtaining goods by means of a false token or writing, which fails to allege that the token or writing was delivered by the defendant, and received by the prosecuting witness, in exchange or payment for the goods, is bad, and the motion to quash it ought to be sustained.

From the Wabash Circuit Court.

A. Hess, for appellant.

F. T. Hord, Attorney General, M. Good, Prosecuting Attorney, and W. B. Hord, for the State.

Howk, J.—In this case the appellant was indicted, tried, found guilty and sentenced to the State's prison for a term

90	504
139	249
139	366
90	504
146	242
90	504
153	83
153	87
90	504
170	491

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Wagoner v. The State.

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of years, for obtaining money on false pretences. From the judgment of conviction he has appealed to this court, and has here assigned a single error, namely: That the trial court erred in overruling his motion to quash the indictment.

The indictment charged, in substance, "that Jacob Wagoner, on the 17th day of January, 1882, at the county of Wabash and State of Indiana, did then and there unlawfully, feloniously, designedly and with intent to cheat and defraud George Lynn and Nicholas Morrison, represent and pretend to said Morrison that a certain written order and token, for the payment of money, which is in these words and figures, as follows:

"\$5.50.

ANTIOCH, January 17th, '82.

"Mr. George Lynn: Pay to the order of Fred Miller the sum of five dollars and fifty cents.

(Signed) "JOHN BECHTEL."

Which the said Jacob Wagoner then had in his possession, was good and genuine, and of the value of \$5.50, and was then the property of him, the said Wagoner, by means of which said false token and pretence the said Jacob Wagoner did then and there obtain of and from the said Morrison certain personal property of great value, to wit: Fifty-eight yards of calico, then and there of the value of \$3, six yards of muslin, of the value of \$1.50, and five pounds of cotton, of the value of \$1, all of the aggregate value of \$5.50; all of said goods being then and there the personal goods and chattels of the said George Lynn and Nicholas Morrison, which said goods and personal property aforesaid were then and there delivered to said Wagoner by said Morrison; he, said Morrison, at the time he so gave and delivered said goods to said Wagoner, did then and there wholly rely upon and believe said order to be good and genuine, and of the value of \$5.50, as represented by said Wagoner, and, thus relying on the genuineness and validity of said order, then and there delivered said goods to said Wagoner, as aforesaid. Whereas, in truth and in fact, the said written order and

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token was not good and genuine, and of the value of \$5.50, but forged, counterfeit and wholly worthless, and of no value whatever, as the said Wagoner then and there well knew."

The felony intended to be charged in the foregoing indictment is defined, and its punishment prescribed, in section 2204, R. S. 1881. In so far as applicable to the case at bar this section provides as follows:

"Whoever, with intent to defraud another, designedly, by color of any false token or writing; \* \* \* obtains from any person any \* \* \* thing of value; \* \* \* shall be imprisoned in the State prison not more than seven years nor less than two years, and fined in any sum not more than one thousand dollars nor less than ten dollars."

Manifestly, we think, this section of the statute was intended to be, and must be regarded as, a complete revision of the law in relation to the felony of obtaining money or property of value, by color of any false token or writing, or any false pretence. By comparing section 2204, *supra*, with section 27 of the felony act of June 10th, 1852, which continued in force until September 19th, 1881, and until the taking effect of section 2204, it will be observed at once that the words, "*or any false pretence*," in section 27 of the former law, were omitted from and did not appear in the revised section 2204. In *Shaffer v. State*, 82 Ind. 221, the omission of the words, "*or any false pretence*," in the revised section, was noticed by the court, but it was not found necessary, in that case, to consider or decide the question there suggested as to the effect of such omission. In this case, however, the question is so presented that it must be decided; for it is claimed on behalf of the State that the words, "*or any false pretence*," although omitted from the revised section 2204, were not thereby repealed.

We are of the opinion that this position can not be sustained. In *Longlois v. Longlois*, 48 Ind. 60, this court held that where a new law, either in the form of an amendment or otherwise, covers the whole subject-matter of the former stat-

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Wagoner v. The State.

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ute, and is inconsistent with it, and evidently intended to supersede it and take its place, it repeals the old law by implication. The general rule is that where a new statute covers the whole subject-matter of an old one, adds new offences and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication. *Norris v. Crocker*, 13 How. (U. S.) 429; *President, etc., v. Bradshaw*, 6 Ind. 146; *Leard v. Leard*, 30 Ind. 171; *Dowdell v. State*, 58 Ind. 333; *State v. Christman*, 67 Ind. 328. It seems clear to us that, under the rule here declared and often recognized in the decisions of this court, section 27 of the felony act of June 10th, 1852, was repealed by implication by the revised section 2204, *supra*.

In this connection, we may properly remark, that by an act approved March 6th, 1883, section 2204, *supra*, is now so amended that it contains the omitted words "or any false pretence," at their proper place in such section.

The appellant's counsel says, in argument: "I claim that, to make a case under the present statute, it must be by color of a false token or writing alone, unaided by any verbal false pretence or representation; that the false token or writing must be of such a character that a person of ordinary caution would give it credit, without relying upon any verbal representations or false pretences whatever." We do not think that the words "by color of any false token or writing," as used in the statute, should receive any such rigid, literal, or limited interpretation. Fairly construed, we think that the statutory phrase means, by making a false token or writing to appear different from what it is, or by representing such false token or writing to be true and genuine. It is claimed that the token or writing copied in the indictment was not of such a character that a person of ordinary caution would give it credit. Whether or not the token or writing was of such a character can not be regarded as a question of law. It was purely a question of fact, which might, very properly,

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 Bottorff et al. v. Covert et al.
 

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we think, have been submitted to the determination of the jury. *Miller v. State*, 79 Ind. 198.

Appellant's counsel further says: "It is not shown in the indictment that the order was delivered to Lynn and Morrison, or that it was received by them in exchange for, or in payment of, the goods." This objection to the indictment seems to be well taken, is supported by authority and must be sustained. In *Johnson v. State*, 11 Ind. 481, it was said: "The indictment is bad. The pretence alleged is, that Johnson presented and offered to one William H. Nicholson some of Hamer's checks, calling for, in the aggregate, \$17, and represented to him that they were good, and of nearly par value, when they were not good and of such value, etc., and by means of such pretence obtained a set of harness, etc. It is nowhere averred that the checks were delivered to Nicholson, or that they were received by him in payment for the harness. It seems to us that, in a case like the present, there should have been such an averment." The case cited was approved in *State v. Orvis*, 13 Ind. 569, and in *Jones v. State*, 50 Ind. 473.

It must be held, therefore, in the case now before us, that the court erred in overruling the motion to quash the indictment.

The judgment is reversed and cause remanded, with instructions to quash the indictment, etc. The clerk will issue notice for the return of the appellant to the sheriff of Wabash county.

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 No. 10,046.

## BOTTORFF ET AL. v. COVERT ET AL.

DECEDENTS' ESTATES.—*Fraudulent Conveyance*.—*Creditor*.—A single creditor, as well as an administrator or an executor, may maintain an action to set aside a sale of lands fraudulently made by a deceased debtor.

SAME.—*Petition of Creditor for Sale of Land to Pay Debts*.—*Statute Construed*.—Section 2342, R. S. 1881, which authorizes a creditor to obtain an order

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186	147
90	508
147	584
90	508
153	7

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requiring the administrator or the executor to file a petition for a sale of the decedent's lands, only authorizes such order for the sale of lands owned by him at the time of his death, and not such as may have been fraudulently conveyed.

**SAME.—*Creditor May Set Aside Sale of Land Fraudulently Conveyed.***—A single creditor may maintain the action, and after the sale is set aside the land becomes assets in the hands of the administrator or executor, who thereafter settles the estate in the usual way.

**SAME.—*Complaint.—Insolvency.***—Where the complaint in such case avers that the decedent, at the time of such conveyance, had no other property, and there are no assets in the hands of the administrator, the complaint is sufficient in this respect, as it is not necessary to aver that the decedent did not thereafter acquire property.

**SAME.—*Motion to Annul Order to Sell.—Practice.***—A motion to strike out an order requiring the administrator to sell the land and apply the proceeds upon the creditor's debt was too broad, as the direction to sell the land was right though the direction to apply the proceeds was wrong.

From the Clark Circuit Court.

*A. Dowling* and *M. C. Hester*, for appellants.

*J. K. Marsh*, for appellees.

**BEST, C.**—The appellee Mary E. Covert brought this action against George Bottorff, Alexander Bottorff, and Matilda Bottorff, administratrix of the estate of William Bottorff, deceased, to set aside a certain conveyance as fraudulent, and to subject the land to the payment of a judgment the appellee had recovered against the estate of said decedent.

The complaint averred, in substance, that on the 26th day of September, 1871, and while the appellee was a minor, one Miles Bottorff became her guardian, and executed his bond, with William Bottorff as his surety; that immediately thereafter said guardian received \$600 belonging to the appellee and converted the same to his own use; that William Bottorff was, at the time, the owner of the real estate in the complaint described, and after he had learned that said guardian had converted said money as aforesaid, he and said Matilda, on the 31st day of January, 1876, for the purpose of defrauding the appellee out of her claim, conveyed said land to George and Alexander Bottorff, two of their children, who

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*Bottorff et al. v. Covert et al.*

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accepted said conveyance to aid them in such fraudulent purpose; that on the 12th day of July, 1881, the appellee recovered a judgment upon said bond against said Miles Bottorff and the estate of said decedent for \$420, which remains wholly unpaid; that said Miles is notoriously insolvent, and said William, at the time of such conveyance, had no other property, nor are there any assets in the hands of said administratrix with which to pay said judgment, or any part thereof; that said Matilda claims a lien upon said land, acquired against said George and Alexander, at the time of such conveyance, etc. Prayer that the conveyance be set aside, the lien cancelled, and for other relief.

A demurrer to the complaint, on the ground that the plaintiff had not legal capacity to sue, and because the complaint did not state facts sufficient to constitute a cause of action, was overruled, and an answer in denial was filed. The issue was tried by the court, a finding made for the appellee, and, over a motion for a new trial, judgment was rendered upon the finding, setting aside the conveyance and ordering the administratrix to sell the land as required by law, so that the proceeds might be applied in payment of the judgment. A motion to modify the judgment by striking therefrom the portion directing the administratrix to sell the land was overruled, and these several rulings are assigned as error.

The purpose of this action was to set aside the conveyance alleged to have been fraudulently made by the decedent, and to subject the land to the payment of the appellee's judgment.

Lands thus conveyed and held by a person with knowledge of the fraud, are liable to be sold for the payment of the decedent's debts. R. S. 1881, sections 2333 and 2334.

To render such lands available, it is necessary to avoid such fraudulent conveyance, and the principal question discussed upon the demurrer to the complaint is whether a creditor can maintain such action while the estate is in process of settlement. The appellants insist that such action can alone be maintained by the executor or the administrator; while the

appellee insists that it may also be maintained by the creditors. The statute, as before remarked, renders lands thus conveyed and held, liable to be sold for the payment of the decedent's debts, and it empowers an executor or administrator who has been authorized to sell lands thus conveyed, to file a petition before the sale to avoid the fraudulent conveyance. R. S. 1881, section 2335.

It has also been held, under a precisely similar statute in the Revision of 1852, that an administrator may, before he obtains an order to sell, file his petition to set aside a conveyance as fraudulent, if it is shown that it will be necessary to sell the land for the payment of the decedent's debts. *Love v. Mikals*, 11 Ind. 227. The same right undoubtedly exists under the Revision of 1881, and it thus appears that an administrator or executor has ample authority, either before or after he obtains an order to sell real estate, to maintain an action to set aside a fraudulent conveyance, and to subject lands thus conveyed to the payment of the decedent's debts.

Can a creditor also maintain such action? The statute does not authorize it, and the appellants insist that the remedy furnished by the statute is exclusive. The appellee, upon the other hand, insists that this right is possessed independent of the statute, and that the remedy thus furnished is only cumulative. This question has not been passed upon since the Revision of 1881 went into force, but while the Revision of 1852, containing precisely the same statutes, was in force, this court, in the case of *Tyler v. Wilkerson*, 20 Ind. 473, held that creditors might maintain an action to set aside such conveyance, and that the remedy given by statute to the administrator was simply cumulative. The case was again before this court, and its previous ruling was adhered to upon this point. *Tyler v. Wilkerson*, 27 Ind. 450. Since then it has not been passed upon. It is true that the facts averred in the case of *Baugh v. Boles*, 66 Ind. 376, presented this and some other questions, but this precise question was not considered. The action was treated as a proceeding to collect a

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claim against the decedent from his heir, and it was held, as has often been decided in this State, that this, as a general rule, can only be done through an administration of the estate. This case can not, therefore, be regarded as a decision of this question. The cases first above alluded to settle the question that creditors, under the revision of 1852, could maintain an action simply to set aside a fraudulent conveyance, and we perceive no reason why the same right does not exist under the Revision of 1881.

The appellants also insist that section 2342 of the R. S. 1881 authorizes the creditor to require the administrator to file his petition for the sale of lands thus conveyed, and that the remedy thus given precludes the idea that he may himself maintain an action to set aside such conveyance. The statute alluded to provides that "Any creditor of the decedent whose claim shall have been filed and allowed by the court may file his petition showing the insufficiency of the personal estate of the decedent to pay the liabilities thereof, and that the decedent died owning real estate liable to be made assets for the payment of his debts, and praying an order requiring the executor or administrator to proceed to sell such real estate for the payment of such debts." The executor or administrator is entitled to five days' notice of the time when the petition will be presented for hearing, and, if upon the hearing, the petition is found to be true, the court is required to order the executor or administrator, within a reasonable time, to be fixed by the court, to file a petition for the sale of the land. It will be observed that this statute does not in terms apply to lands fraudulently conveyed, but such as the decedent owned at the time of his death, and we do not think it can be construed to embrace the former. The reason is obvious. When the executor or administrator, at the instance of a creditor, is ordered to proceed, he is required to file a petition. This is the ordinary petition, and the widow, if any, and the heirs of the decedent, must be made parties, as the title to such lands as he owned at the time of his death is in

them. The title to lands fraudulently conveyed is not in them, nor have they any interest in such lands. The title is in the purchaser, and such lands, as between him and his vendor or his heirs, belong to the purchaser. The purchaser holds such lands subject to the claims of the vendor's creditors, and they may be sold to satisfy his debts; but if sold, and the proceeds exceed the amount of the debts, the excess belongs to the purchaser and not to the vendor's heirs. There is no necessity to file a petition as required by said section, and we do not think its provisions apply to lands fraudulently conveyed. This section, therefore, can not affect the question under discussion.

The cases above alluded to hold that "creditors" may maintain the action, and this has led us to enquire whether the same may be done by a single creditor, without any enquiry as to the rights of other creditors. In chancery, where one creditor sought to sell property for the payment of his claim, it was never permitted without an enquiry as to the rights of other creditors. *Wilson v. Davis*, 37 Ind. 141, and authorities cited.

The purpose of the requirement was to effect a complete settlement of the estate in chancery. The object of this suit is different. Its purpose is simply to vacate the sale so that the land may become assets for the payment of debts. After this is done, the estate is settled by the executor or administrator in the usual way. There is no necessity for such enquiry under our system, and no reason now occurs to us why the rule should apply to this case. Where there is a necessity for selling lands thus conveyed, the creditor has an interest, and if he is willing to assume the risks of a contest, the fruits of which, if successful, will enure to the benefit of all the creditors, we know of no good reason why he may not maintain the action. The law ought not to shield such purchasers by limiting the means by which such property can be placed where it justly belongs, and, therefore, we are of opinion that such action may be maintained by any creditor.

The appellants also insist that the complaint was insuffi-

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cient, because it did not show that the decedent did not leave other real estate, and that no assets came into the hands of the administratrix. We think the complaint in this respect sufficient. It is averred that the decedent had no other property at the time the conveyance was made. If so, and the conveyance was made, as alleged, it was fraudulent as against creditors. The cause of action that then accrued continued, and if there was no property at the commencement of the suit with which to satisfy the claim, the appellee was entitled to have the conveyance set aside. The averment is "that there are no assets in the hands of the administratrix." The term "assets" embraces all property liable to be sold for the payment of the decedent's debts, and the averment was sufficient to show that there was nothing with which to pay the appellee's judgment. It was not necessary to aver that the decedent did not acquire property after the conveyance. *Cox v. Hunter*, 79 Ind. 590; *Bruker v. Kelsey*, 72 Ind. 51.

The complaint was sufficient and the demurrer properly overruled.

A new trial was asked on the ground that the finding was contrary to law, and not supported by sufficient evidence. We have examined the evidence, and under the well established rule, that where there is any evidence tending to support all the material averments of the complaint, this court will not disturb the judgment upon the weight of the evidence, we can not disturb this judgment on that ground.

The appellants also insist that the court erred in refusing to modify the judgment as requested. The motion was to strike out that portion requiring the land to be sold and the proceeds to be applied upon the appellee's judgment. This motion was too broad. It was proper to order the land sold, but the proceeds should not be applied upon the judgment to the exclusion of other creditors, if any. The proceeds must be applied upon the debts generally, and the judgment may be yet so modified, if necessary. The motion as made was too broad, and for that reason was properly overruled.

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Nicholson v. Combs *et al.*

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This disposes of all the questions discussed, and as we are of opinion that there is no error in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that judgment be and it is hereby in all things affirmed, at the appellants' costs.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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No. 10,239.

## NICHOLSON v. COMBS ET AL.

PROMISSORY NOTE.—*Execution.*—The execution of a promissory note includes both a signing and delivery, and implies a complete contract.

SAME.—*Material Alteration.*—The material alteration of a promissory note made at the instance of the payee, and without knowledge of the maker, releases the latter from liability.

SAME.—After a promissory note is signed and delivered, the procurement by the payee of an additional signature, without the knowledge of the maker, releases the latter.

From the Clark Circuit Court.

*J. H. Stotsenburg*, for appellant.

*M. C. Hester*, for appellees.

ELLIOTT, J.—To the complaint of appellant, charging that the appellees William C. Combs, Richard F. Nugent and David S. Koons executed to him the promissory note sued on, the appellees Combs and Nugent answered separately. The answer of the former is, omitting formal parts, as follows: "That after he and his co-defendant Richard F. Nugent had executed and delivered the note sued on herein, and without the knowledge or consent of this defendant, the plaintiff procured David S. Koons to subscribe the said note as one of the makers thereof."

It is urged that the answer is bad, for the reason that it

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121	122

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Nicholson v. Combs *et al.*

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does not aver that the name of Koons was added after the note was completed. This position is not tenable. The word executed implies both a signing and a delivery, and a signed note duly delivered is a complete contract. In a legal sense the word "execute" includes delivery and implies a complete contract. *Graham v. Graham*, 55 Ind. 23, *vide* p. 28; *Prather v. Zulauf*, 38 Ind. 155.

It is settled law in this State that the material alteration of a promissory note, made at the instance of the payee, and without the knowledge of the maker, releases the latter from all liability on the note. *Hert v. Oehler*, 80 Ind. 83; *Bowman v. Mitchell*, 79 Ind. 84; *Monroe v. Paddock*, 75 Ind. 422. It is also firmly settled that the addition of the name of a party as maker is a material alteration of the instrument. *Harper v. State, ex rel.*, 7 Blackf. 61; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 Ind. 139; *Bigelow Bills and Notes*, 579.

The answer was unquestionably good.

The answer of Nugent is the same as that of Combs, with the exception of a change in names, and the questions arising upon it are, therefore, disposed of by what has been said in considering the latter's answer.

There was testimony showing that the note sued on was signed and delivered by the appellees, that it was accepted by the appellant, and that, after this had taken place, the latter, without the knowledge of the former, procured Koons to sign as a maker; it can not, therefore, be said that the finding of the trial court is not sustained by the evidence.

After the signing and delivery of the note, the appellees could not recall it nor the appellant change it. From that time it became a complete and perfect contract. The silence of the makers vested no authority in the payee to procure an additional signature to the note. The delivery of the note closed the contract, and it was the duty of the appellant to have kept it unchanged.

Judgment affirmed.

Howk, J., took no part in the decision of this case.

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Madgett v. Fleenor et al.

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No. 10,486.

## MADGETT v. FLEENOR ET AL.

PRINCIPAL AND SURETY.—*Land of Surety Sold on Execution and Purchased by Principal.*—A principal debtor who buys the lands of his surety upon execution issued against them jointly, merely pays his own debt, and in equity takes no title to the lands.

PRACTICE.—*Harmless Error.*—There is no available error in sustaining a demurrer to a good paragraph of complaint, if the same facts might be proved under another paragraph upon which there is issue and a trial.

From the Brown Circuit Court.

— *Durral, R. L. Coffey, T. W. Woollen and D. D. Banta*,  
for appellant.

*G. W. Cooper*, for appellees.

BICKNELL, C. C.—The complaint by the appellant against the appellees contains four paragraphs.

The first prays that the plaintiff's title to a certain quarter section of land may be quieted.

The other three paragraphs pray that a certain sale on execution of the plaintiff's said land to the defendants may be declared invalid, and that the certificate of purchase given by the sheriff may be cancelled. The difference between the second, third and fourth paragraphs is, that the second states in general terms that said land was not subject to levy and sale under said execution; while the second and third paragraphs state the facts particularly, showing that a certain judgment rendered against the plaintiff and the defendant Milton Fleenor, was against said Fleenor as principal and the plaintiff as surety, and was not to be levied of the plaintiff's property until after the exhaustion of said Fleenor's property, and that the sheriff, under an execution thereon, sold said land as the plaintiff's property to the defendant Joseph Fleenor, who bought it as the agent of and with the money of said Milton Fleenor, and took the certificate of purchase in his own name, and holds it for the benefit of said

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*Madgett v. Fleenor et al.*

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Milton Fleenor, and that the two Fleenors "colluded" together in said purchase in order to defraud the plaintiff and compel him to pay said Milton Fleenor's debt. Demurrers to the first, third and fourth paragraphs were sustained by the court, and upon these rulings the errors are assigned.

The question presented by the third and fourth paragraphs is, can a principal, who refuses to pay his debt, and buys the surety's land at a sale under an execution against both, be permitted to hold the land as against the surety, and thus compel the surety to pay the debt which such principal ought to have paid.

As between the principal and the surety in such a case, the principal merely pays his debt to the amount of his bid, and equity requires that the surety shall hold the title to the land, unclouded by such a purchase.

In *VanHorne v. Eversen*, 13 Barb. 526, VanHorne gave a bond conditioned for the payment of money. One Gross held a life-estate in certain land, with remainder to VanHorne's wife in fee; they mortgaged the land to secure the payment of the bond; VanHorne failed to pay the money and the land was sold under the mortgage; VanHorne bought it and claimed to hold it as against the mortgagors, but the court said he could not be permitted "to make out a good title through his own turpitude and dishonesty."

The third and fourth paragraphs of the complaint are, therefore, substantially good.

The only objections made to the first paragraph of the complaint are that it does not contain the full names of the parties, and that, after stating the plaintiff's ownership and possession of the land, it states that "The defendants pretend to claim some interest in, to wit, a title in fee to the whole or some part thereof, or claim to said real estate, derived through a certain pretended judicial sale thereof, and adverse to the title of the said plaintiff."

But this paragraph, in its title, contains the full names of

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Madgett v. Fleenor *et al.*

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the plaintiff and of the defendants, and mentions them afterwards as "the said plaintiff" and "the said defendants." This is sufficient; in such a case the proper names of the parties need not be repeated in the body of the paragraph.

As to the other objection, such a mistake as the use of the word "in" instead of the word "therein," after the word "interest," could not mislead, and must be held immaterial. The court, therefore, erred in sustaining the demurrers, but the errors appear to have been harmless.

The cause was tried by the court upon the second paragraph of the complaint and the general denial thereof. The finding and judgment were for the appellant as to three forty acres of the quarter section in controversy, and that the appellees have no title thereto, and that, as to the fourth forty acres of said quarter section, the defendants are entitled to the possession thereof, and the court decreed that said levy and certificate of sale, as to said three forty-acre tracts, should be cancelled, set aside and held for naught, and that the appellant should recover his costs.

The evidence is not in the record, but the facts particularly stated in the paragraphs demurred to were admissible in evidence under the general allegations of the second paragraph, and the rule is that where the plaintiff, under one paragraph of the complaint may have the full benefit of the facts properly pleaded in other paragraphs, there is no available error in sustaining demurrers to such other paragraphs. *Whiteman v. Harriman*, 85 Ind. 49.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

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 Ethel v. Batchelder.
 

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No. 10,374.

**ETHEL v. BATCHELDER.**

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120	165
90	520
165	583
90	520
1171	318

**TAX SALES OF REAL ESTATE.—Action to Quiet Title.—Married Woman.—**

*Sufficiency of Complaint.—Demurrer.*—In an action by a married woman to quiet the title to her real estate against the purchaser thereof, for State and county or city taxes, if she fail to show that her real estate was not legally subject to taxation for State and county or city purposes, or that the delinquent and current taxes and costs, for which her real estate was sold, were not properly and legally assessed and charged against her and her property, or that the several sales of her real estate for taxes, by the treasurers of the county and city respectively, were, in some manner or for some cause, irregular, illegal and void, or that she had redeemed, or offered to redeem, her real estate from the tax sales thereof, in the manner prescribed by law, her complaint must be held bad on a demurrer thereto, for the want of sufficient facts.

*SAME.—Redemption.—Rights of Married Woman.—Certificate of Sale.—Possession of Premises.—Rents and Profits.*—Under section 210 of the tax law of December 21st, 1872, a married woman might redeem her lands from sales thereof for taxes within two years after the expiration of her disability, but the statute gave her no additional rights in relation to such redemption; and under section 203 of the same law (1 R. S. 1876, p. 120), the auditor's certificate of the tax sale entitled the holder to the possession of the premises therein described, and this title to possession carried with it the ownership of the rents and profits of the lands, without liability to account therefor.

*PRACTICE.—Reversal of Judgment.—Supreme Court.*—Where a cause is tried upon issues joined on a complaint of two or more paragraphs, and it appears that a demurrer to one of the paragraphs has been erroneously overruled, the Supreme Court will reverse the judgment for such erroneous ruling, unless the record affirmatively shows that the verdict and judgment rest exclusively upon the good paragraphs of the complaint.

From the Madison Circuit Court.

*C. L. Henry* and *H. C. Ryan*, for appellant.

*M. S. Robinson*, *J. W. Lovett* and *I. L. Bloomer*, for appellee.

Howk, J.—Upon the record of this cause the appellant, the defendant below, has assigned errors as follows:

1. In overruling his demurrer to the first paragraph of appellee's complaint; and,

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2. In overruling his motion for a new trial.

We will consider and decide the questions presented by these alleged errors in the order of their assignment.

1. In the first paragraph of her complaint the appellee alleged, in substance, that she then was, and for more than ten years last past had been, a married woman; that she then was, and since April 26th, 1863, had been, the owner in fee simple of certain real estate, particularly described, in the city of Anderson, in Madison county; that on February 12th, 1877, at a sale for taxes held by the treasurer of Madison county, the said real estate was sold by such treasurer to one Charles F. Williams for \$22.82, the amount of delinquent and current taxes due the county and State, and costs, and the county auditor issued to such purchaser a certificate therefor according to law; that said Williams assigned such certificate to one H. C. Ryan, on May 15th, 1877, and said Ryan, on December 21st, 1877, assigned the same to one John H. Terhune, and that on February 13th, 1879, said Terhune received from the county auditor a deed of such real estate, a copy of which deed was therewith filed; that on the — day of February, 1879, said real estate was sold by the treasurer of the city of Anderson, for delinquent and current city taxes, to one F. M. Mulligan for the sum of \$43.26, and a certificate of purchase was issued to said Mulligan therefor, which certificate was afterwards assigned by him to said Terhune, and by him to the appellant; that on August 29th, 1879, Terhune and wife conveyed by quitclaim deed their interests in such real estate; that thereupon the appellant took and had ever since retained possession of such real estate, and had rented and controlled the same, and had received as rents therefor the sum of three hundred and fifty dollars.

And the appellee averred that, by reason of her coverture at the times of such tax sales and the continuance of her coverture until the commencement of this suit, she had the right to redeem such real estate from such tax sales; that the auditor's deed thereof was wrongfully made to Terhune, and

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he and appellant had no right to the possession of the real estate or to receive the rents thereof, and she averred that the amount received by appellant exceeded the amount of such tax sales, with all penalties and interest thereon, and all taxes lawfully assessed against such real estate and paid by appellant, with all penalties and interest thereon, and all legal charges against the same, and exceeded the amount necessary for appellee to pay for the redemption of the real estate from such tax sales; and the appellee said that she was entitled to, and appellant was wrongfully in, the possession of such real estate, and he unlawfully detained the same from her by reason of the premises, and that such tax deed and the appellant's claim were a cloud upon appellee's title to such real estate which should be removed by the decree of the court. Wherefore the appellee prayed the court for an accounting between her and the appellant as to the amount due him by reason of such tax sales, penalties, interest and charges, and all taxes, penalties and interest paid by him, and for all rents and profits due her and collected by him, and for such decree in regard thereto as may be deemed just and equitable; and she prayed judgment for the possession of such real estate, and that her title thereto might be forever quieted and set at rest as against the appellant, and for all proper relief.

We are of the opinion that the facts alleged by appellee in the first paragraph of her complaint were not sufficient to constitute a cause of action, and that the demurrer thereto ought to have been sustained. It will be observed that there are no averments, in this paragraph of complaint, showing or tending to show that appellee's real estate was not legally subject to taxation for State and county or city purposes, or that the delinquent and current taxes and costs, for which her real estate was sold, were not properly and lawfully assessed and charged against her and her property, or that the several sales of her real estate, by the treasurers of the county and city respectively, were in any manner or for any cause irregular or illegal, and, therefore, void. Nor was it alleged, in

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the first paragraph of complaint, that the appellee had, at any time, redeemed or offered to redeem, her real estate from the tax sales thereof, or either of them. In the consideration of the sufficiency or insufficiency of the first paragraph of complaint, therefore, we must assume at the outset, that the appellee's real estate was regularly and lawfully sold by the treasurers, alike of the county and city, for delinquent and current taxes and costs properly and legally assessed against the same, and that the appellee had neither redeemed, nor offered to redeem, her real estate from either of the sales thereof for taxes, in the manner prescribed by law.

At the time of the sale of appellee's real estate for taxes by the county treasurer, the law of this State governing the redemption of land from sales for taxes for State and county purposes, as applicable to the case in hand, was sections 208 and 210 of the act of December 21st, 1872, "to provide for a uniform assessment of property, and for the collection and return of taxes thereon." 1 R. S. 1876, p. 121. Section 208 provided, in substance, that the owner or occupant of any land sold for taxes, or any other person, might redeem the same at any time within two years after the last day of such sale, by paying to the county treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, and the amount of all subsequent taxes paid, with fifty per centum on the whole sum and interest from the date of purchase, or from the time of payment. In section 210 it was provided as follows: "Infants, idiots, *femmes covert*, and insane persons may redeem any lands belonging to them, sold for taxes, within two years after the expiration of such disability." These two sections were amended by an act approved March 3d, 1877 (Acts 1877, Reg. Sess., p. 143); and the amended sections remained in force until they were superseded by sections 6466 and 6467, R. S. 1881, which took effect March 29th, 1881, and are still in force. There has been and is no substantial change in the two sections, except in relation to the per centum to be paid

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by the redemptioner, which is not a material question in this case as now presented.

As to the sale for city taxes, it was provided at the time of the sale in section 42 of the general law of March 14th, 1867, for the incorporation of cities, that the owner or claimant of any lot or parcel of land sold for city taxes, his agent or attorney, might redeem the same "upon the terms and in like manner as the lands sold for State and county taxes are redeemed, by payment to the city treasurer." 1 R. S. 1876, p. 284.

It was averred by appellee in the first paragraph of her complaint, that, at the times of the sales of her real estate for taxes, both by the county treasurer and city treasurer, and at the time of the commencement of this suit, she was a married woman. There can be no doubt, therefore, that the appellee had, when she commenced this suit, a clear legal right to redeem her real estate from the sales thereof for taxes, although much more than two years had elapsed since the dates of such sales. We are of the opinion, however, that she could redeem her real estate from the tax sales thereof only in the manner prescribed by the statute, that is, by paying to the proper county or city treasurer, for the use of the purchaser, his heirs or assigns, the sums mentioned in the certificates respectively, and the amounts of all subsequent taxes paid, with the legal percentages on the whole sums, and interest from the dates of purchase or from the times of payment.

It will be seen from the first paragraph of the complaint, a full summary of which we have given in this opinion, that it fails to show, in any manner, that the appellee had redeemed, or offered to redeem, her real estate from the tax sales thereof either by the county treasurer or by the city treasurer, in the mode prescribed in and by the statute. The appellee alleged that the appellant had no right to the possession of her real estate, or to receive the rents thereof; and she averred that the amount of rents, received by the appellant from her real estate, exceeded the amount of such tax sales, with all penalties and interest thereon, and all taxes lawfully assessed

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against such real estate and paid by appellant, with all penalties and interest thereon, and all legal charges against the same, and exceeded the amount necessary for the redemption of the real estate from such tax sales; and she prayed for an accounting between her and the appellant.

The facts alleged by appellee in the first paragraph of her complaint showed very clearly, that, under the law, the appellant or his assignors, near and remote, were entitled to the possession of her real estate from the date of the first tax sale thereof, and of the certificate issued by the county auditor therefor, to wit, February 12th, 1877. In section 203 of the tax law of December 21st, 1872, in force at the time of such sale, it was expressly provided that the auditor's certificate of the tax sale should "entitle the holder to the possession of the premises therein described." 1 R. S. 1876, p. 120. This title to the possession of the real estate carried with it the right to receive the rents of such real estate, and the absolute ownership of such rents without liability to account therefor. This was so, we think, under the statute in force at the time of such sale, and fixing and governing the rights as well of the purchaser as of the redemptioner, whether the latter was under legal disability or not. The statute extended the time within which the appellee, as a married woman, might redeem her real estate from the tax sales thereof; but it gave her no additional rights in relation thereto beyond those of any adult person, male or female, and of sound mind.

Under the averments of the first paragraph of the complaint, the tax deed of the real estate to Terhune was improvidently and illegally executed by the county auditor during the appellee's coverture; but the execution of this deed could not, in any manner, prejudice the appellee's right to redeem her real estate from the tax sales thereof, in the mode and within the time prescribed in the statute. Nor do we think that the execution of the tax deed impaired or prejudiced, in any degree, the rights of the appellant, or of his grantor or assignor, under the certificates of the tax sales of the appel-

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lee's real estate. Our conclusion is, therefore, that the court clearly erred in overruling appellant's demurrer to the first paragraph of appellee's complaint.

The second paragraph of appellee's complaint was a complaint, in the ordinary statutory form, for the recovery of the possession of the same real estate described in the first paragraph. We can not say, from the record of this cause, that the finding and judgment below, in appellee's favor, were made and rendered wholly and exclusively upon the second paragraph of the complaint. On the contrary, we think that a material portion of the finding and judgment herein, as shown by the record, rests exclusively upon the first paragraph of complaint. Where, as in this case, the judgment below is rendered upon a complaint of two or more paragraphs, and it appears that a paragraph, which is clearly bad, has been held good upon a demurrer thereto for the want of sufficient facts, and the ruling assigned here as error, the judgment must be reversed by this court, unless the record shows clearly and affirmatively that such judgment was rendered wholly and exclusively on the good paragraphs, and not, also, on the bad paragraph of the complaint. *Schafer v. State, ex rel.*, 49 Ind. 460; *Evansville, etc., Co. v. Wildman*, 63 Ind. 370; *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

As the judgment must be reversed on account of the insufficiency of the first paragraph of the complaint, we need not now consider or decide any of the questions arising under the alleged error of the court in overruling the appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the first paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Gray v. Robinson *et al.*

No. 10,791.

## GRAY v. ROBINSON ET AL.

**JUDGMENT.—Mistake.—Correction.—Practice.**—Mistakes in judgments may be corrected by motion, and do not require either a complaint or a summons, and a complaint may be regarded as a motion and a summons as a notice; and where the controversy is heard and determined upon the evidence, the pleadings and rulings thereon are harmless.

**SAME.—Principal and Surety.**—Where a judgment is taken upon a promissory note against the principal and sureties, by mistake in computing the amount, for less than is due, and enough property of the principal levied upon to satisfy the debt, and the sureties, to save it from sacrifice, have paid the judgment, without any knowledge of the mistake made, settlement had with the principal on the basis of the judgment, taking the obligation of a third person to indemnify themselves for the sum so paid, the property having been disposed of and the principal insolvent, such judgment will not be corrected as against the sureties.

**MISTAKE.—Relief From.**—A party will not be relieved from his own mistake or carelessness, where rights have been lost or money parted with on the faith of the apparent facts.

From the Vigo Circuit Court.

*J. H. C. Royse and J. M. Rees, for appellant.*

*S. C. Stimson and R. B. Stimson, for appellees.*

**BICKNELL, C. C.**—Sarah C. Gray, on February 25th, 1882, recovered a judgment on a promissory note against John B. Cassaday and Marion Cassaday as makers, and Robinson, Crews and Harris as sureties. The judgment was for \$1,059.14.

As against the Cassadays it was a judgment by default, but as against the sureties it was a judgment by agreement, for the amount estimated to be due as computed by the plaintiff, and announced by her in open court as the amount due.

She afterwards discovered a mistake in said estimate and announcement, and that the amount really due was \$1,276.85.

She then had the cause reinstated on the docket, and filed a written motion to correct the judgment, stating therein that "the judgment was erroneously entered by the court, at the direction of the plaintiff's attorneys, for \$1,059.14, when it should have been rendered for \$1,276.75." This motion

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130	430
90	527
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90	527
151	82

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was made on September 12th, 1882, and was taken under advisement.

On September 26th, 1882, the plaintiff showed the court that, upon said written motion, a summons in the common form had been issued and served upon the defendants, the Cassadays, "requiring them to answer the complaint of said Sarah C. Gray for correction of judgment." Upon this the Cassadays were defaulted, but the sureties appeared and answered the motion in two paragraphs, of which the first alleged that they appeared in the original action as sureties only, and knew nothing about the amount of the payments on the note, or the amount due, but supposed that judgment was taken for the proper amount; that, if not so taken, it was in consequence of the plaintiff's negligence, to which the defendants did not contribute; that the plaintiff had an execution issued on the judgment against principals and sureties, and levied the same upon a large quantity of wheat and other property of the principals sufficient to pay the entire debt in a reasonable time, but the plaintiff urged immediate payment, and these defendants, the sureties, to prevent a sacrifice of the wheat, which was in the shock unthreshed, were compelled to pay and did pay said judgment without knowledge of any error therein; that they then made a settlement with said principals, on the basis of said judgment, and released said property from execution, and took the obligation of a third person to indemnify themselves for the sum so paid for said principals; that said property has since been disposed of and said principals have become wholly insolvent, and if said judgment be now increased these defendants will have no remedy.

The second paragraph of the answer stated that said principals paid and satisfied said execution, and that said property, so levied on, would have been sufficient to pay the judgment, and the additional demand of the plaintiff, if it had been properly incorporated in the judgment, but that since the satisfaction of the judgment the principals have dis-

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posed of all the property levied on and are now wholly insolvent.

The plaintiff's objection to this answer and her motion to strike it out were overruled, and her demurrer to said answer was overruled. She then replied in denial.

The cause was submitted to the court, who, at the request of the defendants, made a special finding of the facts and stated the conclusions of law thereon, as follows:

1. That this court, on the 25th day of February, 1882, rendered judgment in said cause for the sum of \$1,059.14 in favor of the plaintiff, Sarah C. Gray, against John B. Cassaday and Marion K. Cassaday, as principals, and against defendants, Henry C. Robinson, Alexander Crews and Richard J. Harris, as sureties, upon a promissory note, which note and the endorsements thereon are in the words and figures following:

Here follow a copy of the note and copies of several credits endorsed thereon.

2. That judgment was rendered against defendants Cassaday and Cassaday, upon default.

3. That defendants Robinson, Crews and Harris appeared to said action and answered jointly that they were guarantors of said note; that by agreement of the plaintiff with said Robinson, Crews and Harris, the court rendered judgment against them as sureties. The amount then estimated to be due, as computed by the plaintiff, and by her announced in open court, was \$1,059.16, for which judgment was rendered.

4. That there was an error in the computation of the amount due on said note of \$217.71, and that the true amount then due was \$1,276.85, in place of \$1,059.14, for which judgment was rendered.

5. That after the rendition of said judgment plaintiff caused an execution to issue thereon against both principals and sureties, and delivered the same to the sheriff of said county, who levied the same upon a large quantity of goods and chattels belonging to the principal defendants, and sub-

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ject to execution, and of the value of \$1,300, and sufficient to satisfy said judgment, including the additional sum erroneously omitted from said judgment, together with the costs of said suit.

6. That on the — day of —, 1882, the said principal defendants and the said sureties, in order to facilitate the payment of said judgment and prevent further costs, made an agreement with one Wellington Cassaday, whereby said sureties were to pay and did pay the full amount of said judgment, costs and interest thereon accrued to that date, and said Marion K. Cassaday and John B. Cassaday were to give said property to said Wellington Cassaday, who, upon his part, agreed to repay the sum so paid by these sureties to them in one year from that time; that these sureties thereupon released from the lien of the execution all said goods and chattels, and in full settlement therefor said sureties took from said Wellington Cassaday his note, secured by mortgage, for a sum equal to the judgment which said sureties had paid, and after said goods were so released, the same were all transferred to the said Wellington Cassaday by the said principal defendants, and became his absolute property.

7. That said sureties, Robinson, Crews and Harris, had no actual knowledge, either at the time of the date of the rendition of the judgment, or at the date of the payment thereof, of the said error, nor of the credits to which the principals were entitled at either of said dates, and that they, in good faith, paid the same and surrendered all their interest in the property levied upon.

8. That the goods and chattels so levied upon, released and transferred to said Wellington Cassaday embraced all the property of the principal defendants subject to execution, and that at the time of the filing of said plaintiff's motion to correct said judgment, the defendants John B. Cassaday and Marion K. Cassaday were and still are wholly insolvent; that the only evidence offered or admitted in the original suit on said note was the note itself.

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9. That as to John B. Cassaday and Marion K. Cassaday, as a conclusion of law, the plaintiff's motion to correct said judgment ought to be sustained; but as to the other defendants, Robinson, Crews and Harris, the said motion ought to be overruled.

The plaintiff excepted to the conclusions of law. She also moved for judgment in her favor on the special findings. This motion was overruled. Judgment was rendered for the defendants, the sureties, pursuant to the findings, and for the plaintiff as to the principals. The plaintiff moved for a new trial for the following reasons:

1. Permitting an answer to be filed to the motion.
2. Overruling the motion to strike out the answer.
3. Overruling the demurrer to the answer.
4. Admitting evidence in proof of the answer.
5. Overruling plaintiff's motion for judgment in her favor on the special findings.

This motion was overruled. The plaintiff appealed. Errors are assigned as follows:

1. Permitting the defendants to file an answer.
2. Overruling the motion to strike out the answer.
3. Overruling the demurrer to the answer.
4. Overruling the plaintiff's motion for judgment on the special findings.
5. Overruling the motion for a new trial.
6. Overruling the motion to correct the judgment.

There was no error in overruling the motion for a new trial; none of the reasons alleged for a new trial were available for that motion. *Buskirk's Prac.* 113.

The only questions presented by the record are:

1. Is it an error, available on appeal, to permit pleadings and issues upon a motion to correct a mistake in a judgment.

Judgments are properly corrected by motion, and this is a summary proceeding, and does not require either a complaint or a summons. *Sherman v. Nixon*, 37 Ind. 153; *Hughes v. Hinds*, 69 Ind. 93; *Latta v. Griffith*, 57 Ind. 329; *Urbanski*

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v. *Manns*, 87 Ind. 585. But a complaint may be regarded as a motion and a summons as a notice. *Jenkins v. Long*, 23 Ind. 460; *Goodwine v. Hedrick*, 29 Ind. 383; *Latta v. Griffith*, *supra*; *Miller v. Royce*, 60 Ind. 189.

In the present case both parties were irregular, the plaintiff in issuing a summons to answer a complaint, instead of giving notice to answer a motion, and the defendants in filing an answer when no answer was required.

But the controversy was heard and determined upon the evidence; the result was the same as if the proceedings had been summary. In such a case, the pleadings and the rulings thereon are harmless. *Bales v. Brown*, 57 Ind. 282. When a correct result is reached, a cause will not be reversed for an error in the mode of reaching it. *Holcraft v. King*, 25 Ind. 352. There was no error in admitting evidence outside of the judgment. *Jenkins v. Long*, *supra*; *Freeman* Judg., p. 63, section 72.

2. Do the facts justify the conclusions of law?

The mere fact that a judgment has been paid is not a valid objection to its correction. *Sherman v. Nixon*, *supra*.

The mere fact that at the trial the plaintiff's attorney, by mistake, states to the court a less amount, as due upon the note sued on, than is really due, will not, necessarily, prevent the correction of the judgment. *Hughes v. Hinds*, *supra*.

Ordinarily, mistakes can be corrected without injury, but here the appellees were sureties; they were not liable on the execution until after the exhaustion of the property of their principals; enough property was levied upon to pay not only the judgment but also the excess now claimed; the plaintiff having demanded in open court a specific sum as due, and having taken judgment for that sum, these defendants, having no knowledge of the amount of payments made before judgment, and being about to relieve themselves of responsibility by paying the judgment, had a right to rely and act upon the plaintiff's statement publicly made in open court; and having made an arrangement which satisfied the judgment

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and relieved them, but which left the principal debtors insolvent, it would be unjust to such sureties, if the plaintiff, having taken advantage of the more prompt payment secured by the arrangement, should now be permitted to increase the judgment because of her own mistake, and thus compel the sureties to pay the excess after the principals had become insolvent. Mistakes are corrected because equity requires it, but there is no equity in the correction here sought as against the sureties.

A party will be relieved against his own mistake or carelessness where no rights of third persons have intervened, but not where rights have been lost, or money parted with, on the faith of the apparent facts, without fault of any body except the party seeking relief.

The case of *Flanders v. O'Brien*, 46 Ind. 284, was a proceeding to correct a mortgage so as to include more land, as against a judgment creditor, who had purchased in good faith, for a valuable consideration, a judgment against the mortgagor, after the execution of the mortgage. It was held that there was no equity in favor of the plaintiff, and this court said: "It is their fault if the papers do not speak the truth, and it may be unjust that their mistakes should be cured to his injury, who has been misled by their failure to attend carefully to their own business."

In Freeman on Judgments, section 66, it is said: "The entry of judgments or decrees *nunc pro tunc*, is intended to be in furtherance of justice. \* \* \* Generally such conditions will be imposed as may seem necessary to save the interests of third parties, who have acted *bona fide*, and without notice; but if such conditions are not expressed in the order of the court, they are, nevertheless, to be considered as made a part of it by force of the law."

This language was referred to with approbation in *Urbanski v. Manns*, 87 Ind. 585, where, upon a motion to correct a judgment by a *nunc pro tunc* entry, this court held that whatever rights sureties had acquired, without notice, between the orig-

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inal entry of the judgment and its correction, should have been saved to them by the order of the court.

In Freeman on Judgments, section 74, we find the following: "Amendments of the entries of judgments and of decrees, \* \* will only be permitted in furtherance of justice, and on such terms as shall protect the interests of third parties acquired for a valuable consideration without notice."

In the cases cited by the appellant, there was no violation of equity in the correction of the judgments, but here, if the judgment be corrected as to the sureties, they will lose their money and their remedy, without any fault of their own, by the mere negligence of the plaintiff's attorney.

We think the conclusion of the court below was right, that the appellant was not entitled to the correction of the alleged mistake, as against the sureties, under the facts stated in the special findings. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

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 No. 9304.

### HEAGY v. BLACK ET AL.

**INJUNCTION.**—*Harmless Error.*—*Practice.*—The refusal to dissolve a temporary restraining order is not available error upon an appeal from a judgment for a perpetual injunction; to present any question upon such ruling the grounds of the motion must be shown by bill of exceptions.

**SAME.**—*Joinder of Parties.*—*Location of Highway.*—*Trespass.*—Where a supervisor, claiming to act under an order of the board of county commissioners locating a highway, attempts its location on a line deviating from that named in the order, he is guilty of a trespass, and each land-owner over whose lands he is threatening to open the road, if he has no adequate remedy at law, may maintain an action to enjoin such trespasser, but such land-owners, having separate and distinct causes of action for such trespasses, can not join as plaintiffs in such an action; but where the proceedings of the board are void, and irreparable damage would be done to the property of each of a number of persons by the acts of the supervisor

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138	92

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in opening the road on the line designated by such proceedings, a joinder is permitted to avoid a multiplicity of suits.

**HIGHWAY.—Report of Viewers.—Public Utility.—Presumption.**—It is not necessary to the validity of the order of the board of county commissioners locating or changing a highway in a proceeding for such purpose, that the viewers should report the proposed road of public utility, or that the board should expressly so find. If the report be favorable, and silent as to the public utility of the location or change, or if they do not report that the location or change is not of public utility, it should be presumed that they deemed it of public utility.

**SAME.**—The report of viewers appointed to locate or change a highway will be presumed to have been made in conformity with the statute, where nothing to the contrary appears.

**SAME.—Notice.—Collateral Attack.—Jurisdiction.**—That the notice of the presentation of a petition for the location or change of a highway was given, is a jurisdictional fact to be determined by the county board, and where it has found that notice was given, and proceeded to act by the appointment of viewers, its decision is conclusive of such notice as against collateral attack.

**SAME.—Injunction.—Complaint.**—For complaint and allegations held insufficient to restrain by injunction the location of a highway under an order of a county board, see opinion.

From the Kosciusko Circuit Court.

*C. Clemans* and *A. C. Clemans*, for appellant.

*H. S. Biggs* and *J. W. Cook*, for appellees.

**BLACK, C.**—The appellant was the defendant, and Noah Black and John Trump were the plaintiffs, in a suit to enjoin the defendant, a road supervisor, from removing fences and opening a highway over certain lands of the plaintiffs in Kosciusko county.

A restraining order was granted in vacation until the third day of the next term. On the first day of that term, the defendant moved to dissolve the restraining order and to dismiss the cause. On the next day, the court overruled the motion, and thereupon the defendant demurred to the complaint for want of sufficient facts. The demurrer was overruled, and further proceedings, which need not be specially mentioned, resulted in a perpetual injunction, and the defendant appealed.

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Since the cause was submitted in this court, said Noah Black has died, and said John Trump has been appointed administrator of his estate, and as such has been substituted as an appellee for said Noah Black, deceased. One of the assignments of error questions the action of the court "in overruling the appellant's motion to dissolve the temporary injunction and dismiss the cause."

There can be no available error in refusing to dissolve an interlocutory injunction upon an appeal from a final judgment for a perpetual injunction. *Board of Comm'rs v. Markle*, 46 Ind. 96. But the ruling upon this motion could not be reviewed, for the reason that the grounds of the motion are not shown by bill of exceptions.

Of the other specifications in the assignment of errors, we need only notice that by which it is assigned that the court erred in overruling the demurrer to the complaint.

The complaint showed that the plaintiff Noah Black was the owner in fee simple of the southwest quarter of section 25, township 32, range 7 east, in said county, and that the appellee John Trump was the owner in fee simple of the northwest quarter of the same section, except sixty acres off the north side thereof; that on the 10th of March, 1879, one Alfred Hoover and others filed their petition before the board of commissioners of said county, asking for the location of a public highway on the section line between section 25 and section 26 in said township, and the vacation of an old road running in the same general direction; that the plaintiffs did not join in said petition, and never consented that the proposed highway might be established and run through their lands or the land of either of them or their enclosures. It was alleged that the board of commissioners appointed viewers, who reported that in their opinion the public would not be in any way injured by said proposed change; that the board ordered that said change and vacation be granted as set forth in the report of the viewers, and that said road should be vacated when the new road should be made as good and

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passable as the old road, by the petitioners, to the acceptance of the proper township trustee; that the defendant was pretending to act as a supervisor in said county, and was threatening to throw down the enclosure and fence of the plaintiff Black, commencing at the southwest corner of his said land, and to open and cut a new road through his said enclosure, running a little diagonally to the present line and road and encroaching on his enclosure all the length of said line, until at the northwest corner of his said land it should be about four rods from the present line; that by so throwing down his fence his enclosures, containing growing wheat and un-gathered corn, and his pasture land would be exposed to the common; that the appellant was threatening to make and open a road along said line, to make which it would be necessary to dig up and excavate the earth along the route to the depth of eight or ten feet at places, and he would destroy certain bearing fruit trees, planted and cultivated for said Black's orchard, and certain shade and ornamental trees, particularly described, in said Black's front yard; that said farm was improved, and the houses and buildings were built with reference to the old road, which had been located for about thirty-five years; that the proposed road would run within six or eight feet from the front door of plaintiff Black's dwelling-house, and would destroy his milk and spring-house and his well; that said road would throw open and expose to the common the orchard and pasture of the plaintiff Trump, his clover field and his field of growing wheat; that eighty rods of his fences would be torn down and destroyed, and his certain bearing fruit trees would be destroyed; that to construct said road there would have to be great digging up of the ground and excavating the earth, in places along said road, about six feet, and filling it in at other places to great depth; all of which acts the appellant was threatening to do and would begin to do, as the supervisor of roads of said township, with a large force of hands and teams, on the next Thursday. It was alleged that the proposed road would not run on the "line di-

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viding the lands of the parties," but the old road ran on that line; that the appellant had no authority of law to open said road; that the viewers did not report, and said board did not find, in any form, that said proposed highway was or would be of public utility; that said board never ordered said road opened; that it will be seen from reading the record of said board in said matter that no notice was given, as provided by law, of the application for such change and vacation, and therefore the board had no jurisdiction to appoint viewers; that the petition does not set out the full names of all the parties and owners of the lands through which said change would pass; that said road would run through the enclosures of the plaintiffs of more than one year's standing; that the plaintiffs were first informed of the intention of the appellant to throw down their fences and expose their crops and enclosures to the commons, and to excavate and make said proposed road, "yesterday"; that he had notified the hands in his district, as the supervisor thereof, to appear on said ground on the next Thursday, for the purpose of opening said road, and that if he were not restrained he would proceed, etc.

There is obscurity as to the purpose of the pleader in some portions of the complaint. While it is not alleged that the defendant was about to open the new highway upon a line other than that proposed in the petition for its location and designated in the report of the viewers, which coincides with the west line of the lands of the plaintiffs, as described in the complaint, it is stated, in substance, that a portion of said lands would lie west of the new road, which would not run on the line dividing the lands of the "parties," the pleader probably meaning thereby the plaintiffs and the owners of lands lying immediately adjoining those of the plaintiffs on the west. There seems to have been an intention to raise a controversy about the true location of the section line.

The complaint does not show a joint or common interest of the plaintiffs in the lands mentioned, but shows that each owned a distinct portion thereof in severalty.

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If the proceedings before the board of commissioners were not void, the defendant could not be enjoined at the suit of either or both of the plaintiffs, from doing such damaging acts as were mentioned in the complaint in the opening of the highway upon the line established by said proceedings. If, said proceedings not being void, the defendant was about to open a highway upon a line deviating from that so established, and to do such acts for that purpose, or if said proceedings were void, the acts threatened by the defendant would be his individual acts, and would constitute a private trespass. *Sidener v. Norristown, etc., Co.*, 23 Ind. 623; *Bolster v. Catterlin*, 10 Ind. 117; *Lewis v. Rough*, 26 Ind. 398. And the threatened acts, if unauthorized, would constitute such a trespass that either plaintiff, being without a plain and adequate remedy at law, might maintain a suit to enjoin the defendant. *Daubenspeck v. Grear*, 18 Cal. 443; *Shipley v. Ritter*, 7 Md. 408; *Wilson v. City of Mineral Point*, 39 Wis. 160; *Thatcher v. Humble*, 67 Ind. 444.

Could the plaintiffs join in such a suit as this?

If it was intended to allege in the complaint that the defendant was about to open the road on a line other than that established by the board, we think the plaintiffs could not unite on that ground, and that such allegation was immaterial in a joint suit. Such deviation would be a separate and distinct trespass as to each plaintiff. One would not be affected by the encroachment or trespass upon the land of the other. The issue to be tried as between the defendant and one plaintiff would be wholly different from that between the defendant and the other plaintiff. Each would have a right to equitable relief, but neither one upon the same grounds as the other, nor on grounds wholly like those of the other. Each could show that his injury would be irreparable, and that it would be occasioned in the execution of the same general purpose, but the excavations and the destruction of trees, etc., which would constitute the irreparable damage, would be different in each case. The evidence which would show

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the damage of one would not show any damage to the other, and the plaintiffs would have no common interest; there would be no single wrongful or invalid act, official or private, which would comprehend in its effect the common or the separate injury of both. *Marselis v. Morris, etc., Co.*, Saxton, 31.

If, the purpose being to prevent the opening of the road as ordered by the board, each plaintiff would be irreparably damaged as to his separate property, would the additional fact that the proceedings of the board of commissioners were void, constitute such a community of interest as to authorize the joinder of the plaintiffs? We think that to this question the answer must be in the affirmative, that such a joinder is permissible to avoid a multiplicity of suits.

It is well established in this State by many decisions, that a number of taxpayers may unite to enjoin the collection of an illegal tax affecting them separately, or to set aside as void illegal proceedings of local officials, whereby a debt, which would result in taxation, would be unlawfully created against a county, city or town, of which such plaintiffs are taxpayers; and that a number of individual owners of separate lots or lands may unite to enjoin the enforcement against such lots or lands of an assessment for a local improvement and to set aside such assessment because of its illegality. No adequate remedy can be granted at law to such taxpayers or owners, and in this State they may separately maintain the suit for injunction; or, to prevent a multiplicity of suits, they may unite. In such cases, the fact that the object of the suit on the part of each plaintiff is to protect his property, in which the others are not interested, does not prevent their joinder. The illegality of one act or proceeding which affects them all injuriously, in like manner, furnishes a sufficient community of interest to permit their joinder for the purpose of suppressing a multiplicity of suits.

We think that the principles which authorize such joinder are applicable to the case at bar, and that if the facts stated in the complaint show that the proceeding before the board

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of commissioners was void, the plaintiffs were entitled to join in the action, and the complaint is sufficient. It is, therefore, necessary to examine the allegations in regard to the proceedings before the board.

It was not necessary that the viewers should report that the proposed road would be of public utility, or that the board should expressly so find. The statute, section 5016, R. S. 1881, provides that if the viewers "shall deem the highway to be located or the change to be made of public utility, they shall lay out and mark the same on the best ground, not running through any person's inclosure of one year's standing, without the owner's consent, unless, upon examination, a good way can not otherwise be had."

The next section provides that such viewers shall make a report of their proceedings at the next session of the board of commissioners, "giving a full description of such location, change, or vacation, by metes and bounds and by its course and distance; except that in case of the vacation of a road, or any part thereof, such description only as will designate it clearly shall be required."

When objection is made to the proposed highway, vacation or change, as not being of public utility, and thereupon other viewers are appointed, as provided in section 5023, these other viewers shall report whether or not, in their opinion, it will be of public utility.

If the report of the viewers appointed as were those mentioned in the complaint be favorable to the location, vacation or change, and silent on the subject of public utility, or if they do not report the proposed highway or change not to be of public utility, it should be presumed that they deemed it of public utility. The report in this case was not to the effect that the proposed change would not be of public utility. The viewers reported that, in their opinion, the public would not be in any way injured by the proposed change. This part of the report was merely surplusage.

Nor does the statute require that the board shall indicate

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their finding that the proposed highway, vacation or change is of public utility, except as this may be inferred from their decision in favor of the proposed highway, vacation or change. The board is guided by the report of the viewers. Upon the coming in of the report, it is provided by section 5018, R. S. 1881, that if no objection be made to the proposed highway, vacation or change, the board shall cause a record thereof to be made, and shall order the same to be opened and kept in repair; and section 5028 provides that the order for laying out any highway shall specify its width.

It is alleged in the complaint, in one place, that the commissioners never ordered the road opened; but it is said in another place that the board ordered that said change and vacation be granted as set forth in said report. We must presume, against the pleading, that the report of the viewers was in conformity with the statute, except as the contrary may be shown, and that it gave a full description of the location by metes and bounds, and by course and distance, and that it clearly designated the old road to be vacated. This averment of the order made by the board must be regarded as destroying whatever effect could be claimed for the allegation that the board never ordered the road opened.

But it is alleged that the board further ordered that said road should be vacated when the new road should be made as good and passable as the old road, by the petitioners, to the acceptance of the proper township trustee.

A statute enacted in 1855, being section 5051, R. S. 1881, provides: "Whenever any person shall procure the establishment of a highway, private or public, by a change of one already established on or across his own land, before the same shall be received by the proper superintendent as such, it shall be made as passable as the old highway, or as nearly so as the nature of the case will admit, of which fact the trustee of the township in which the change is made shall be duly satisfied before such superintendent shall be required to keep it in repair."

We suppose that the board of commissioners had this statute in contemplation in the making of the order mentioned in the complaint. It may be presumed, as was shown on the trial, that the supervisor was acting under the proper order from the trustee. We can not say that the statute was not sufficiently complied with. The supervisor's proposed action was the practicable mode of carrying out the order against the unwilling land-owners. He would not be acting under an order which the board had not authority of law to make.

The complaint alleged that it will be seen from reading the record of the board of commissioners, that no notice was given, as provided by law, of the application for the change and vacation, and that, therefore, the board had no jurisdiction to appoint viewers.

This is a collateral attack upon a judgment of a court of record of limited and special jurisdiction. The statute provides, "Whenever twelve freeholders," etc., shall petition the board for the location, vacation or change of any highway, "such board, if it shall be satisfied that due notice of such application has been given by publication," etc., "shall appoint three persons to view such highway." R. S. 1881, section 5015. The presentation of the petition required by the statute gives the board jurisdiction to make this inquiry concerning notice. The giving of the notice is a jurisdictional fact, and if the board has found that due notice was given as provided by the statute, and has proceeded to act by appointing viewers, the decision in regard to notice is conclusive.

It was not alleged that the notice required by law was not given, and that the board did not find that it had been given; and if the record must show that the board did so find, otherwise than by showing that viewers were appointed, it was not alleged that the board's record did not show that it did so find.

It can not be alleged by way of collateral attack, that it will be seen from reading the board's record that no notice was given as provided by law. *Board, etc., v. Markle*, 46 Ind.

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96; *Board, etc., v. Hall*, 70 Ind. 469; *Miller v. Porter*, 71 Ind. 521; *Stoddard v. Johnson*, 75 Ind. 20; *Argo v. Barthand*, 80 Ind. 63; *Wright v. Wells*, 29 Ind. 354; *Kissinger v. Hanselman*, 33 Ind. 80; *Wild v. Deig*, 43 Ind. 455 (13 Am. R. 399).

The statute provides that in the petition for the location, change or vacation of a highway, "the names of the owners and occupants or agents of the lands through which the same may pass" shall be set forth. R. S. 1881, section 5001; *Hays v. Campbell*, 17 Ind. 430.

The complaint alleged that the petition did not set out the full names of all the parties and owners of the lands through which said change would pass. If the failure to set forth in the petition the names of all the owners and occupants or agents of such lands can be ground for collateral attack, and that, too, by one not alleging that he was not himself named, the complaint did not show a failure to comply with the statute. It might be, notwithstanding what was alleged, that the statute was complied with as to those lands, the owners of which were not named in the petition, by naming the agents thereof.

The question of the passing of the road through enclosures of one year's standing without the owner's consent, even if it were alleged that a good way could otherwise be had without departing essentially from the route petitioned for, if not raised before the commissioners, could not be raised in a direct attack by appeal; and whether raised before the commissioners or not, can not be raised in a collateral attack. It is not a question affecting the jurisdiction of the commissioners. See *Crossley v. O'Brien*, 24 Ind. 325; *Green v. Elliott*, 86 Ind. 53.

If it would be a sufficient ground for a joint action by the plaintiffs, that they were not notified by the supervisor according to section 5030, R. S. 1881, to remove their fences, this was not alleged. The fact that they did not know until "yesterday" that he would throw down their fences and expose their crops, etc., could not be a sufficient reason for his being restrained by injunction from doing such acts.

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The complaint was insufficient on demurrer, and, therefore, the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, and the cause is remanded, with instruction to sustain the demurrer to the complaint.

No. 10,479.

## THE TOWN OF ALBION v. HETRICK.

NEGLIGENCE.—*Complaint.*—*Master and Servant.*—*Contributory Negligence.*—In an action against a town for a personal injury received while attempting to cross a gully in a street, over which the plaintiff was driven by his servant in a wagon loaded with hay, an allegation in the complaint, that the plaintiff was without fault, is equivalent to an allegation that neither the plaintiff nor his servant was in fault; and allegations, that, though seeing the gully, the plaintiff believed it reasonably safe to make the attempt, and used due and ordinary care, and that there was no other safe road, do not show contributory negligence on the part of plaintiff.

SAME.—*Question of Fact for Jury.*—In such case, whether the plaintiff, in attempting to cross the gully, was guilty of negligence, is a question of fact for the jury.

SAME.—*Interrogatories to Jury.*—In such action, it is not error to refuse to submit to the jury interrogatories asking for conclusions of mingled law and fact, as whether or not it was prudent for the plaintiff to attempt to drive over the street in its then condition.

SAME.—*Witness.*—*Opinion.*—Upon the trial of such action, the opinions of witnesses who are acquainted with the street are not admissible to prove that the place was so dangerous that a prudent man would not attempt to cross it.

SAME.—*Instruction.*—It is not error in such action to refuse to instruct the jury that if another was driving the team which was hauling the wagon in which the plaintiff was voluntarily riding, and the negligence of the driver contributed to the injury, the plaintiff could not recover.

TOWNS.—*Incorporation.*—*Evidence.*—*Judicial Knowledge.*—Courts take judicial knowledge of the incorporation of towns, and proof thereof is not necessary.

From the Noble Circuit Court.

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*A. A. Chapin and R. P. Barr, for appellant.*

*H. G. Zimmerman, for appellee.*

BICKNELL, C. C.—This was an action by the appellee against the appellant. The complaint averred that the defendant, after notice, wrongfully permitted one of its streets to remain in an unsafe and dangerous condition ; that a gully, from one to three feet deep, ran diagonally across the whole width of the street, and that the plaintiff, in attempting to cross said gully with his wagon and team and a load of hay, on which he was riding with a driver, was upset and injured, without any fault of the plaintiff, and that although he saw the gully before he undertook to cross it, yet he believed it was reasonably safe to attempt to cross it, and believes he would have crossed it safely, but that his driver was compelled, by a ditch on the right side of the road, to turn the team to the left and toward the gully after the hinder wheels of the wagon were in the gully ; that there was no other practicable road, street or highway. A demurrer to this complaint for want of facts sufficient was overruled, and this ruling was one of the errors assigned by the appellant.

It is objected that the complaint fails to state that there was no fault in the plaintiff's driver, but the complaint does state that the wagon and team and driver were the plaintiff's, and that the plaintiff was riding with the driver on his own load of hay. In such a case an allegation that the injury was sustained without any fault of the plaintiff is equivalent to an allegation that neither the plaintiff nor his servant was in fault. The negligence of the servant is the negligence of the master, when committed in the service and connected with the employment. *Helfrich v. Williams*, 84 Ind. 553. It is urged, also, that because it appears upon the complaint that the plaintiff saw the gully, it was contributory negligence to undertake to cross it with a load of hay ; but the complaint avers that he believed it reasonably safe to make the attempt, and used due and ordinary care, and was without fault, and that there was no other safe road.

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The question whether, in attempting to cross the gully, the plaintiff was in fault, or was chargeable with want of ordinary prudence, was a question of fact for the jury. It might depend upon several circumstances, such as the slope of the sides of the gully and the condition of the soil, etc. It is only when the standard of duty is fixed and certain, or where the measure of duty is defined by law, and is the same under all circumstances, or when the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact. *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188); *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *City of Huntington v. Breen*, 77 Ind. 29; *Wilson v. Trafalgar, etc., Co.*, 83 Ind. 326. In both the cases last cited, the following language from Thompson on Negligence, p. 1203, section 52, is quoted with approbation: "Knowledge of a defect existing in the highway is not, in general, conclusive evidence of negligence in attempting to pass it. One injured upon a street he knew to be dangerous need not show that he exercised *extraordinary* care while upon such street. *A fortiori*, he is not obliged to keep off from such a street altogether. One may proceed if it is consistent with reasonable care to do so; and this is generally a question for the jury, depending upon the nature of the obstruction or insufficiency of the highway, and all the surrounding circumstances." See, also, *Henry County Turnpike Co. v. Jackson*, 86 Ind. 111 (44 Am. R. 274).

It does not appear upon the complaint in the case at bar, that there was contributory negligence in the plaintiff. There was some surplusage in the complaint, describing how the plaintiff, after having crossed the gully with the fore wheels of his wagon, was upset in trying to get out with the hind wheels, in consequence of the ditch on the right side of the street compelling him to turn his team to the left; but this does not render the complaint insufficient. There was no error in overruling the demurrer to the complaint.

The answer was the general denial. A jury returned a

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verdict for the plaintiff. The defendant's motion for a new trial was overruled. Judgment was rendered upon the verdict and the defendant appealed.

The errors assigned are overruling the demurrer to the complaint and overruling the motion for a new trial. Of these the first has been already considered.

One of the reasons for a new trial was that the court erred in refusing to submit to the jury, at the request of the defendant, his second and third interrogatories, to be answered with a general verdict.

These interrogatories were:

"2. Ought the plaintiff to have driven upon the place where the accident occurred in the then condition of the street?"

"3. Was it not imprudent for the plaintiff and his driver to drive over the street, at the place where the wagon was overturned, at the time the accident occurred."

The statute authorizes and requires the court, at the request of either party, to instruct the jury to find specially upon particular questions of fact to be stated in writing. R. S. 1881, section 546.

Each interrogatory must present a single material fact involved in the issues. *Rosser v. Barnes*, 16 Ind. 502. The interrogatories in controversy fail to do this. They ask the jury for conclusions resting on mingled law and fact. The jury, applying to the facts found the law given by the court in its instructions, might reach a conclusion as to the prudence or imprudence of attempting the passage of the street, but such conclusions are not proper subjects of interrogatories. There was no error in rejecting the interrogatories in controversy.

The second and third reasons for a new trial are, that the court erred in refusing to permit the witnesses, Henry Franks and David Matthews, to answer the following question: "Was not the street, at and about the time the injury was received by the appellee, in such a dangerous condition that a prudent man

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would not have ventured to ride over the same upon a load of hay, at the place where he was injured?"

Franks had testified that he had lived in Albion many years and was well acquainted with the street, and had passed over it with a horse and buggy three or four days before the plaintiff was hurt, and had come very near upsetting, and he had described the relative situation of the gully and the ditch on the right side of the road.

Matthews had testified to the same effect, and that he had seen the place a day or two before the accident, and had examined it since the accident, and did not find any change in its condition, and that he was a farmer with considerable experience in loading and hauling hay. The appellant claims that these witnesses had sufficient knowledge of the facts to make their opinions admissible that the place was so dangerous that a prudent man would not have ventured to cross it with a load of hay. Greenleaf on Evidence says: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct, and bearing, whether friendly, or hostile, and the like." See 1 Greenl. Ev. (13th ed.), note to section 440, p. 495. This court, in *Johnson v. Thompson*, 72 Ind. 167 (37 Am. R. 152), said: "The rule as thus stated by Greenleaf is well sustained by other decided cases, and is one by which we feel it our duty to be governed." But the questions put to the witnesses in this case are not confined to a mere enquiry as to the opinions of the witnesses whether the road was out of repair or in a dangerous condition. They go further: they ask the opinion of the witness whether a prudent man would have ventured to cross the road with a load of hay; that is equivalent to asking the opinions of the witnesses, whether the plaintiff was guilty of contributory negligence. We know of no case which will authorize the admission of such opinions, and we think there was no error in excluding them.

Another reason assigned for a new trial is that the court

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erred in sustaining a challenge made by the appellee to one Forkner as a juror, because he was a resident taxpayer of the town of Albion. But this is held in Indiana to be a good cause of challenge. *Hearn v. City of Greensburgh*, 51 Ind. 119. There was no error in this respect.

There were several objections to the instructions given and refused. The appellant claims that a part of instruction No. 1 given to the jury was too broad. It was as follows:

"Knowledge of the existence of a dangerous place only makes it the duty of the traveller to use care and caution proportioned to the danger which he knows lies in his path."

The appellant claims that this ought to have been modified by adding that, "if it appeared to be so dangerous that a reasonably prudent man would not have attempted to have passed over it under the circumstances, then it would be contributory negligence for appellee to attempt to do so." No such modification was asked for by the appellant, and the substance of the modification was given in a subsequent part of said instruction No. 1. This objection, therefore, can not be sustained.

The refusal of the court to give to the jury instructions Nos. 8, 10, 11 and 16, asked for by the appellant, is claimed as error. Instruction No. 8 is as follows:

"If the evidence shows that another person was driving the team, which was hauling the wagon in which the plaintiff was riding, at the time the injury was received, and that it was a private carriage or wagon, and that the plaintiff was voluntarily riding with the person who was driving the team, and the negligence of such driver contributed to such injury, then the plaintiff can not recover."

The theory of this instruction is that where a defendant has been guilty of wrongful negligence, the plaintiff injured thereby can not recover therefor if the negligence of some independent third person, for whom the plaintiff is not responsible, contributed thereto. But there is no case decided in Indiana which goes to that extent. It is held here that the

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plaintiff can not recover if his own negligence or the negligence of his servant, or any body for whom he is responsible, contributed to the injury; but to hold that the plaintiff's right of action can be defeated by the negligence of some stranger would be in effect making him responsible for the stranger the same as he would be for his own servant. See, upon this point, *Robinson v. New York, etc., R. R. Co.*, 66 N. Y. 11, 13 (23 Am. R. 1). We therefore think that there was no error in refusing to give the 8th instruction asked for by defendant. An intervening agency does not always shield the wrong-doer where the injury flows from his wrongful act. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230); *City of Crawfordsville v. Smith*, 79 Ind. 308 (41 Am. R. 612).

Instructions Nos. 10 and 11, asked for by the defendant, assert the rule to be that if the plaintiff knew the condition of the street at the time, and that it was dangerous, he ought not to have attempted to pass over it, and, therefore, can not recover. It sufficiently appears from what has been heretofore said in this opinion, that there was no error in refusing these instructions.

Instruction No. 16 asserts that although by the issues the corporate existence of the town of Albion, at the time of suit brought, was admitted, yet it was necessary for the plaintiff to prove that such incorporation existed at the time of the injury. But it is not necessary to prove that which the court is bound to take notice of judicially. See R. S. 1881, section 3301.

There was no error in refusing to give to the jury said instruction No. 16.

The appellant also claims that the court erred in modifying instruction No. 5, asked for by the appellant.

This instruction as given was as follows: "If the evidence shows that the plaintiff might have gone upon Walnut or Railroad streets, and from thence west to his place of destination, by a safe route, 'over a street, alley or highway,' without inconvenience, and knew that Hazel street was in a danger-

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ous condition to pass along, considering the character of the load, it was his duty to select the safe course, and if he did not you may find that he was guilty of contributory negligence."

The modification complained of consisted in inserting after the words "safe route" the words "over a street, alley or highway."

We think there was no error in this modification; the plaintiff was not bound to seek a route over private lands.

We have now disposed of all the reasons for a new trial which the appellant's counsel, in their brief, have discussed. We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

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No. 9,718.

LOGAN v. THE VERNON, GREENSBURG AND RUSHVILLE  
RAILROAD COMPANY ET AL.

RAILROAD.—*Appropriation of Lands.—Trespass.—Answer.—Mortgage.—Foreclosure and Sale.—License.*—To a complaint for trespass upon real estate, an answer is good which alleges that on the 6th of June, 1872, a certain railroad, duly incorporated, appropriated the land in controversy, and paid the amount assessed to the heirs who owned the land, one of which was the plaintiff, which payment was accepted and money retained; that on the 2d day of October, 1871, the said railroad executed a mortgage, to secure its certain bonds, on its entire main line and branches, "made or to be made, \* \* and all lands \* \* acquired or appropriated, or which may hereafter be acquired or appropriated by said company, for the purposes of rights of way or for any other purpose"; that said mortgage was foreclosed and the property sold to A., to whom a deed was executed; that the defendant, another railroad organized under the laws of Indiana, by its contractor, also a defendant, by leave, license and direction of such owner under said sale, entered upon the said land for the purpose of constructing a railroad.

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**SAME.**—*Abandonment and Forfeiture.—Pleading.—Collateral Attack.*—A pleading which seeks to set up an abandonment and forfeiture of the road for failure to perform the acts mentioned in section 3980, R. S. 1881, but which does not allege that the forfeiture had been judicially declared in a suit for that purpose at the instance of the State, by information on the relation of the prosecuting attorney, as contemplated by sections 1131, 1132, is bad. A cause of forfeiture, not judicially declared in a direct proceeding, can not be taken advantage of collaterally.

From the Decatur Circuit Court.

*W. H. Matthews and J. Q. Donnell*, for appellant.

*C. Ewing and J. K. Ewing*, for appellees.

HAMMOND, J.—Action by the appellant against the appellees for trespass upon real estate.

The appellees answered the complaint to the effect that on June 6th, 1872, the Cincinnati and Terre Haute Railroad Company, a corporation duly organized under the laws of this State, filed in the office of the clerk of the Decatur Circuit Court an instrument of appropriation, by which it appropriated, for the purpose of constructing its railroad, a strip of ground 100 feet wide, being the real estate described in the appellant's complaint as that upon which the alleged trespass was committed; that upon notice to the owners of said real estate, among whom were the appellant and his wife, as heirs of Edward Simmonds, deceased, and upon application to the judge of the Decatur Court of Common Pleas, appraisers were appointed, who were properly notified and sworn, and assessed to the heirs of said Edward Simmonds, for the land so appropriated, the sum of \$565, which sum was paid to the clerk of the Decatur Circuit Court, and received and receipted for by said heirs, including the appellant, and is still held and retained by them; that on the 2d of October, 1871, said Cincinnati and Terre Haute Railroad Company executed a mortgage to the New York State Loan and Trust Company, as trustee, to secure its bonds then issued "on all and singular the entire main line and branches of the Cincinnati and Terre Haute Railroad Company, made

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or to be made in the State of Indiana, together with all the branches thereof, to be made or already made, and also all lands, tenements and hereditaments acquired or appropriated, or which may hereafter be acquired or appropriated by said company, for the purposes of rights of way, or for any other purpose, and all the easements and appurtenances thereon or thereto appertaining;" that this mortgage was duly foreclosed in the circuit court of the United States for the District of Indiana, and the mortgaged property duly sold under said foreclosure to William B. Tuell, to whom a proper deed, under such sale, was executed on May 29th, 1878. The appellees further aver, in their answer, that the appellee, the Vernon, Greensburg and Rushville Railroad Company, a corporation duly organized under the laws of the State, for the purpose of constructing a railroad from North Vernon to Rushville, Indiana, did, by its contractor, the said appellee Horace Scott, enter upon said strip of ground to construct its road, under the leave, license and direction of said William B. Tuell, and that this is the alleged trespass complained of.

The appellant demurred to the answer. His demurrer was overruled, and he excepted. In reply the appellant admitted the appropriation of the strip of ground in controversy by the Cincinnati and Terre Haute Railroad Company, and the execution of the mortgage by said railroad company, as alleged in the appellees' answer, but averred that said railroad company wholly failed to build and construct said railroad in and over the real estate in controversy; that said railroad company a long time prior to the grievances complained of, to wit, five years before that time, wholly abandoned the building and construction of said railroad in and over the real estate of the appellant, described in his complaint; and that said railroad company, for six years last past prior to the date of the trespass complained of, wholly failed to keep up the directory of its company, and wholly failed during said time to elect directors thereof; that said railroad company, at least

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six years prior to the bringing of this action, wholly dissolved and abandoned its corporate franchises, and failed to expend the sum of \$50,000 upon the line of its road within this State, within any period of two years from the first day of January, 1875, up to the first day of January, 1880, and wholly failed during said time to expend any sum whatever in building and constructing its railroad.

The appellant further alleges, in his reply, that, after the failure of said Cincinnati and Terre Haute Railroad Company to so keep up its board of directory and to expend the sum of \$50,000 upon the line of its railroad, within any period of two years, within this State, neither the mortgagee mentioned in the appellees' answer, nor any other person for said mortgagee, has performed said acts not performed as aforesaid by said railroad company.

The appellees' demurrer was sustained to the reply, and to this ruling the appellant excepted.

The appellant's assignment of errors calls in question the correctness of the court's rulings in overruling his demurrer to the appellees' answer, and sustaining the appellees' demurrer to his reply.

We think the answer was good. It shows a legal appropriation of the strip of ground on which the trespass complained of is alleged to have been committed, as a right of way for the Cincinnati and Terre Haute Railroad Company. Sections 3906-7, R. S. 1881. It shows that the railroad company, to secure its bonds, executed a mortgage on its property, including the strip of ground in controversy. This it had a legal right to do. Section 3911, R. S. 1881. It also shows a proper foreclosure of the mortgage and the sale of the property thereunder to William B. Tuell, who thereby succeeded to all the rights and ownership of said strip of ground that were possessed by said Cincinnati and Terre Haute Railroad Company at the time of the execution of the mortgage, and that the acts constituting the trespass complained of were

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done by the leave, license and direction of said William B. Tuell, by the railroad appellee in constructing its line of railroad. The facts stated in the answer, if true as admitted by the demurrer, established a complete defence to the trespass charged in the appellant's complaint. The demurrer to the answer was correctly overruled.

The appellant, in his reply, attempted to state facts showing, that under section 3980, R. S. 1881, the Cincinnati and Terre Haute Railroad Company, by reason of its failure to perform certain acts, had forfeited all its rights, privileges and franchises. Whether the facts stated would, in a proper proceeding, be sufficient to authorize a judicial decree declaring a forfeiture of such rights, etc., is a question not necessary to decide. But the mode of proceeding to have such forfeiture declared is provided by statute. It is by information, on the relation of the prosecuting attorney, in the circuit court of the proper county. Sections 1131-2, R. S. 1881. The appellant's reply was bad, for failing to aver that the forfeiture of the rights, privileges and franchises of the Cincinnati and Terre Haute Railroad Company had been judicially declared in a suit for that purpose, at the instance of the State. *John v. F. & M. Bank*, 2 Blackf. 367 (20 Am. Dec. 119); *Covington, etc., Plank Road Co. v. Moore*, 3 Ind. 510; *State v. Trustees, etc.*, 5 Ind. 77; *Brookville, etc., Turnpike Co. v. McCarty*, 8 Ind. 392; *Stoops v. Greensburgh, etc., Plank Road Co.*, 10 Ind. 47; *Fort Wayne, etc., Turnpike Co. v. Deam*, 10 Ind. 563; *President, etc., v. Hamilton*, 34 Ind. 506; *White v. State*, 69 Ind. 273.

A text-book on railroads says: "The non-user or misuser of its franchises by a corporation, or its breach of the conditions on which its duration is, by the law of its creation, made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for that purpose. \* \* \* A cause of forfeiture which has not been judicially declared in a direct proceeding can

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not be taken advantage of collaterally. The State alone having the right to insist on a forfeiture can waive it, directly or by implication." *Pierce Railroads*, pp. 11 and 12.

The reply was not sufficient, and the demurrer thereto was properly sustained.

Judgment affirmed, at appellant's costs.

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No. 10,114.

THOMAS v. IRWIN ET AL.

**REPLEVIN BOND.**—*Parties.*—*Joinder of Plaintiffs.*—Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond, and the assignee of one of the judgments, the assignment of which is technically defective, is a real party in interest as plaintiff.

**SAME.**—*Breach.*—*Damages.*—*Judgment.*—Where in replevin there is a trial and verdict for the defendant and that the property be returned, but no judgment of return, the sureties in the bond are not liable for failure to return the property.

From the Bartholomew Circuit Court.

*F. T. Hord, W. B. Hord, R. Hill and J. W. Nichol*, for appellant.

*S. Stansifer, W. D. Stansifer, N. S. Carr, G. W. Cooper and J. W. Morgan*, for appellees.

**ELLIOTT, J.**—The case made by the complaint of appellees, shortly stated, is this: Irwin and Smith recovered judgments against William McEwen, executions were issued and levied upon a field of growing corn and other personal property. Mary McEwen instituted an action of replevin and gave the bond upon which this action is founded; such proceedings were had in the action of replevin as resulted in a verdict and judgment for the defendants therein for the corn, but no provision was made adjudging a return of the prop-

90	557
125	435
90	557
143	230
90	557
150	314
150	342

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erty, although the verdict found that the defendants were entitled to a return. Prior to the issuing of the executions Duffy had become the owner, by assignment, of one of the judgments on which the executions were issued.

The general rule undoubtedly is, that a complaint by two or more persons must show a right of action in all, or it will be bad on demurrer. *Nave v. Hadley*, 74 Ind. 155.

The complaint before us does show a right of action in all the appellees. It may be true, that the complaint does not show a regular and full assignment by Smith of his judgment, but it shows such an assignment as vests an equitable title and beneficial interest. It has been decided that an assignment, although not made as the statute directs, will vest an equitable title in the assignee, and, this being true, it follows that the assignee is the real party in interest. *Lapping v. Duffy*, 47 Ind. 51; *Shirts v. Irons*, 54 Ind. 13; *Kelley v. Love*, 35 Ind. 106. But the case before us goes a step farther, for the execution from which the property was replevied was issued in the name of Duffy, and we do not think that the sureties on the replevin bond are in a position to assert that he was not the party in whose favor it should have issued. The equitable owner of the judgment and the legal party to the execution ought not to be denied his rights at the demand of one who has signed a replevin bond to enable a stranger to the judgment to wrest the property from the possession of the sheriff.

The property upon which the executions were levied supplied a fund for the satisfaction of the two writs, and the execution plaintiffs had a joint and common interest in its preservation. The bond executed to the sheriff was for their mutual benefit, and they had a right to unite in an action upon it. *Moore v. Jackson*, 35 Ind. 360; *Walls v. Johnson*, 16 Ind. 374; *Toles v. Adee*, 84 N. Y. 222.

Where a complaint shows a right to some relief, it will repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5. Whatever may be the law as to the right of appellees to recover the value

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of the property replevied, it is quite plain that there is a right to recover other damages. We are satisfied that the complaint is good.

The difficult question is as to the right of the appellees to recover the value of the property seized under the writ of replevin. This difficulty arises out of the fact that the judgment in the replevin action did not provide for a return of the property.

Judgments and not verdicts rule causes. The verdict in the replevin action exerts no controlling influence in this collateral proceeding, for in it the rights of the parties are to be measured by the judgment, and we can not overleap it and act upon the verdict. Nor can we here enquire whether the judgment was right or wrong.

The bond sued on conforms to the statute in force when it was executed, and reads as follows: "We, Mary Ann McEwen and Richard Thomas, undertake that the plaintiff shall prosecute this action with effect and without delay, and return the property in controversy to the defendant, if a return be adjudged by the court, and pay to him all such sums of money as he may recover against the plaintiff in this action for any cause whatever."

It is a general rule that sureties are not to be held beyond the terms of their contract, and a statutory undertaking must be construed so as to give effect to the terms employed. Baylies Sureties, 128. The liability of the surety on the bond in suit is, by the terms employed, limited to three things, the due prosecution of the action, the return of the property if a return be adjudged, and the payment of such sums of money as may be recovered against the plaintiff. These are independent things. If a complaint should charge a failure to prosecute, and a recovery of damages, it would certainly not be a sufficient answer to aver that the property had been returned; and, on the other hand, if a return had been adjudged in such a case, it would not be sufficient to answer payment of costs and damages. The question is, however, so well settled by

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authority, that we deem it unnecessary to enter upon a discussion of this point, and content ourselves with quoting from a recent treatise the following statement of the rule: "These conditions have always been treated as independent, and if either was not complied with the bond was forfeited," 2 Suth. Dam. 42; and from one of our own cases the following: "Each part of the condition is independent of the other, and the condition is broken and the bond forfeited by a failure in either." *Brown v. Parker*, 5 Blackf. 291.

A surety can not be held for a thing he did not undertake to perform, and in this case the surety did not undertake to be responsible for the return of the property unless a return should be adjudged by the court. This is, as we have shown, an independent condition, and no liability can be fastened on the surety unless it is made to appear that the act alleged to constitute the breach is within the terms of the condition. We are unable to perceive how a failure to return the property can constitute a breach in a case where there has been no judgment for a return. The undertaking is not a general one for the return of the property, but is an undertaking for the return in case it shall be so adjudged, and the contract of the surety is, therefore, restricted and limited by the terms of the instrument. The liability of the surety depends upon the judgment, for unless a judgment is entered awarding a return the case is not within the contract; to bring the case within the terms of the contract, it must be made to appear that the court had awarded a return. To hold the surety liable for a failure to return where no return had been adjudged, would be to hold him in a case not within the spirit or letter of his undertaking.

It is a general rule that all the words of a contract must be given effect, if it can be reasonably done, and this rule would require that effect be given to all the conditions of the bond. But the case does not depend alone upon this rule, for the conditions are, as settled by a long line of decisions, beginning with the early English and continued under the stat-

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utes of George II., from which ours is borrowed, distinct and independent, and this being so it is impossible that two of them can cover one and the same thing. It follows that the conditions refer to and cover different defaults, and that the default, covered by the condition that the plaintiff shall return the property if a return be adjudged, is not the same as that covered by the condition that the action shall be prosecuted with effect and without delay. In the case of *Chambers v. Waters*, 7 Cal. 390, the court held that where a judgment was rendered for the plaintiff in replevin for costs, and no return of the property adjudged, the sureties on the bond were, upon payment of costs, released from all liability. In the subsequent case of *Mills v. Gleason*, 21 Cal. 274, the court held that the rule did not apply to a case where the action was dismissed, and clearly marked the difference between the two classes of cases, but adhered to the general doctrine. In *Clary v. Roland*, 24 Cal. 148, the cases in that court were reviewed, and it was held that in order to entitle the plaintiff to a recovery for anything more than costs and nominal damages, it must be shown that there was an alternative judgment for the return of the property, or for its value, in case a return could not be had. In *Nickerson v. California Stage Co.*, 10 Cal. 521, this language was used: "The defendant objects that under our statute there should have been a finding of the value in the replevin suit, and an alternative judgment for the return of the property or the payment of its value. This would have been necessary to enable the plaintiff to recover against the sureties on the replevin bond, but the failure to do so can not affect his rights as to the defendants." The case of *Mitchum v. Stanton*, 49 Cal. 302, carries the doctrine somewhat further, and declares that where the bond contains the provision if a return be awarded by the court, it will not extend to an award of a return by any other court than that in which the bond was given. In *Ladd v. Prentice*, 14 Conn. 109, it was held that no action would lie for the

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value of the property unless it was shown that a judgment of return was rendered in the replevin proceedings. A like conclusion was reached in *Clark v. Norton*, 6 Minn. 412, and it was there said: "But it does not appear that any return of the property was adjudged by the court, and consequently there has been no breach of the obligation on that head." In *Badlam v. Tucker*, 1 Pick. 284, it was said by the court: "Before we can hold the defendants liable for not returning the property, we must be satisfied that the present plaintiff had, at the time of the commencement of the replevin suit, the right of possession, and this right can not be determined in the present action. \* \* \* The form of the bond is prescribed by law, and must not be extended beyond its obvious meaning." In *Gallarati v. Orser*, 27 N. Y. 324, DENIO, C. J., speaking for the court, said: "In this case there was judgment for damages only, and not for a delivery to the plaintiff of the property for which replevin was sought. \* \* \* Upon this state of the case I think the defendant was not liable. The sureties would not have been responsible on such an undertaking, if it had been given; and if they would not have been, the sheriff is not." Kentucky furnishes a strongly illustrative case, that of *Cooper v. Brown*, 7 Dana, 333, where it was declared that under the English law, which, as we have said, is substantially the same as ours, a return must be adjudged, or no recovery can be had for the value of the property. The case cited effectually disposes of that of *Roman v. Stratton*, 2 Bibb, 199, for if that case is based on a statute unlike ours, it is not authority with us, if on the common law it is wrongly decided and is overthrown. In the case of *Gallarati v. Orser*, *supra*, it was decided that a judgment rendered by agreement of parties, dispensing with the provision for a return of the property, releases the surety on the bond so far as concerns the value of the property replevied. A still stronger case is that of *Ashley v. Peterson*, 25 Wis. 621, where it was held that the judgment must, to bind the surety, be in the alternative, although a law passed after the execution of the bond provided

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differently. It was there said of the bond, that "It was conditioned according to the law then in force, which required the judgment for the plaintiff to be in the alternative, for a delivery of the property in case it could be had. It was for this that the sureties undertook. Their obligation was conditional." The cases of *Webster v. Price*, 1 Root, 56, and *Buel v. Davenport*, 1 Root, 261, give the appellees no aid, for it appears from the statement of the cases that there was a judgment for a return; if, however, this were not so, they would be overruled by the subsequent case of *Ladd v. Prentice*, *supra*. The case of *Hollensbee v. Ritchey*, 49 Ind. 261, strongly supports the conclusion which we have reached.

The court below erred in allowing a recovery for the value of the property replevied.

Judgment reversed.

Petition for a rehearing overruled.

No. 9892.

JAMES v. FOWLER ET AL.

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f164	604
90	563
c165	42

**REPLEVIN.**—*Description of Property.*—*Uncertainty.*—*Sufficiency of Complaint.*—*Motion in Arrest.*—In an action of replevin, mere uncertainty in the description of the property affords no ground for sustaining a motion in arrest of judgment, as such motion only questions the sufficiency of the complaint after verdict.

**SAME.**—*Instructions of Court.*—*Directing Verdict.*—Where, in an action of replevin, the evidence shows, without conflict, the plaintiffs' ownership of the property in controversy, and the only conflict in the evidence is in relation to irrelevant and immaterial matters, the trial court may, without invading or usurping the province of the jury, direct a verdict in favor of the plaintiffs.

**SAME.**—*Estray Law.*—*Trespassing Animals.*—*Defence.*—Where the owners of domestic animals bring an action to recover their possession, it is not a sufficient defence for the defendant to show that he had taken up the animals while trespassing on his premises, but he must also show that he had substantially complied with the provisions of the estray laws after the animals were taken up.

From the Benton Circuit Court.

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*J. C. Pearson*, for appellant.

*M. H. Walker* and *I. H. Phares*, for appellees.

Howk, J.—This was a suit by the appellees to recover the possession of “six head of hogs,” of the value of \$10 each, and of the aggregate value of \$60, of which, they alleged, they were the owners and entitled to the possession, and that appellant had possession thereof, without right, and unlawfully detained the same from the appellees. Wherefore, etc.

The cause was put at issue and submitted to a jury for trial, and a verdict was returned for the appellees, that they were the owners and entitled to the possession of the property described in the complaint, and that, at the commencement of this suit, such property was unlawfully detained by the appellant. Over the appellant’s motions for a new trial and in arrest of judgment, the court rendered judgment for the appellees upon and in accordance with the verdict.

Appellant has here assigned as errors the following decisions of the circuit court:

1. In overruling his motion for a new trial; and,
2. In overruling his motion in arrest of judgment.

The second of these alleged errors calls in question, after verdict, the sufficiency of the facts stated in appellees’ complaint to constitute a cause of action. The only objection to the complaint, pointed out in argument by the appellant’s counsel, is that it does not “particularly describe” the property sought to be recovered. It must be confessed, we think, that there is not much particularity in the description of the property sued for in this case; but, in *Smith v. Stanford*, 62 Ind. 392, it was said, in substance, that the object of the particular description of the property sued for, required by the statute in actions of replevin, would seem to be to enable the proper officer to take and deliver the property to the plaintiff in suit; and it was held that if the description of the property was sufficiently specific for the accomplishment of that object, the complaint would, in that respect, be sufficient.

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Even if this were not so, we are of the opinion that mere uncertainty in the description of the property sought to be recovered would afford no sufficient ground for sustaining a demurrer to the complaint, and no ground whatever for sustaining a motion in arrest of judgment; for such an objection to the complaint, even if it existed, would be removed by the evidence on the trial of the cause, and cured by the verdict. We think, therefore, that the court committed no error in overruling the appellant's motion in arrest of judgment.

Under the alleged error of the court in overruling the motion for a new trial, the appellant's counsel first complains in argument of the only instruction of the court to the jury, as follows:

"Under the evidence in this case, the only questions for the jury are, whether the hogs in controversy, when taken up by the defendant and when this suit was commenced, were the property of the plaintiffs. If it is shown by the preponderance of evidence that at the times named the plaintiffs owned said hogs, then, under the other evidence in this case, about which there is no material controversy, the plaintiffs will be entitled to a verdict in their favor.

(Signed) "E. P. HAMMOND, Judge."

The court did not err, we think, in giving the jury this instruction. Upon the evidence, as it appears in the record, the court would have committed no available error, as it seems to us, if it had instructed the jury, in plain and direct terms, that they must find for the appellees, the plaintiffs below. All the evidence showed, without the slightest conflict, that the hogs in controversy, when taken up by the appellant and when this suit was commenced, were the property of the appellees; and the only conflict in the evidence was in reference exclusively to irrelevant and immaterial matters. In such a case it is well settled that the trial court may, without invading or usurping the province of the jury, direct their verdict in favor of the party entitled thereto. *Dodge v. Gaylord*, 53 Ind. 365, on p. 378, and cases cited; *Moss v. Witness Printing Co.*, 64 Ind. 125; *American Ins. Co. v. Butler*, 70 Ind. 1.

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The evidence wholly fails to show that the appellant complied, or attempted to comply, with any of the requirements of the law in relation to estrays; while it does show that his only claim to appellees' hogs was founded upon the fact that he had taken up the hogs as estrays while trespassing on his land. He seems to have overlooked the point that appellees' ownership carried with it the right to the possession of the hogs, and that this possessory right could not be defeated without a showing on his part, not only that he had lawfully taken up the hogs as estrays, but that he had subsequently complied with all the requirements of the law in relation to estrays, on his part to be kept and performed. The theory of appellant's defence was, that inasmuch as he had lawfully taken up the appellees' hogs as estrays, while trespassing on his premises, he would remain lawfully entitled to the possession of the hogs, without further compliance on his part with the requirements of the estray laws, until the appellees had taken the steps, which they might have taken, under the law of June 4th, 1852, in relation to fences and trespassing animals, for reclaiming the possession of their hogs. This theory was radically wrong. The appellees, as owners of the hogs, were entitled to their possession, unless the appellant could show that, by a strict and continuous compliance with the requirements of the statute, he had not only acquired, but at the commencement of this suit still retained, an existing right to their possession as estrays. There is no evidence in the record showing, or tending to show, that the appellant had, at any time after he had taken up the appellees' hogs, complied, or attempted to comply, with any of the requirements of the estray law by him to be complied with. Here lies the material difference between the case in hand and the case of *Logan v. Marquess*, 53 Ind. 16, upon which the appellant's counsel seems to place much reliance in argument. In the case cited it was said: "It was admitted by the plaintiff that the defendant had complied with all of the provisions of the estray law in taking up the colt, to the time of bringing this

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action." While, in the case at bar, it was not pretended or claimed on the part of the appellant, that subsequent to the taking up of appellees' hogs, he had complied, or attempted to comply, with the provisions of the estray law. The only claim the appellant asserted to the hogs was under the estray law, and when it appeared, as it did, that he had wholly failed to comply with the provisions of that law, he had no legal claim to the possession of the hogs as against their owners.

Appellant's counsel complains of the action of the court in refusing to give the jury certain instructions, at his request. These instructions proceeded upon the theory of appellant's defence, as hereinbefore stated. They were not the law, as applicable to the case made by the evidence adduced upon the trial, and the court did not err in refusing to give them.

The verdict was clearly right upon the evidence, and the motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

HAMMOND, J., took no part in the decision of this cause.

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 No. 10,367.

## RAY v. THE CITY OF JEFFERSONVILLE ET AL.

**CITY.**—*Constitutional Law.*—*Amendment of Statute.*—*Title of Act.*—*Description of.*—Section 2 of the act of April 14th, 1881 (Acts 1881, p. 392), which act is amendatory of a former act, is not unconstitutional because the title of such amendatory act substitutes the word "execute" for "exercise," in reciting the title of the former act, in the following context: "An act to amend sections eight and sixty-nine of an act entitled 'An act to repeal all general laws now in force for the incorporation of cities, \* \* prescribing their powers and rights, and the manner in which they shall execute the same,' " etc.

**SAME.**—*Assessment of Lands not Bordering on Street Improved.*—Said section 2 is not unconstitutional because it authorizes the assessment of lands not bordering on the street to be improved, the same being within fifty feet of such improvement.

**SAME.**—*Apportionment of Assessment by Engineer.*—*Right of Appeal.*—Said sec-

90	567
131	111
90	567
139	109
90	567
164	504
164	532
90	567
163	606

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tion 2 is not open to the objection of cutting off all right of appeal from the apportionment of the assessment by the city engineer; section 71 of the act of March 14th, 1867, gives such appeal.

**SAME.—City Engineer.—Assessment by.—Ministerial Act.**—The assessment required to be made by the city engineer under said section 2 is a ministerial act which the Legislature had the power to impose on such officer, and it is not his act which deprives the lot-owner of his property in event of sale. *Smith v. Duncan*, 77 Ind. 92, distinguished.

**SAME.—Common Council.—Improvement of Streets.—Notice.**—Under section 65 of the act of March 14th, 1867, a street improvement may be ordered by a two-thirds vote of the common council, without a petition of the property-holders, nor is any notice of the assessment required.

**SAME.—Joint Contractors.—Death of One.—Precept.—Affidavit.**—Where the work in improving a street is completed by two joint contractors, and after the assessment is made one dies, a precept may issue thereafter in favor of both, and the affidavit to obtain such precept may be made by such survivor.

**SAME.—Constitutional Law.—Statute Construed.—Assessment of Benefits and Damages.**—The statute is not unconstitutional because it makes no provision for the assessment of benefits and damages occasioned by such improvements.

From the Clark Circuit Court.

*J. H. Stotsenburg and J. K. Marsh*, for appellant.

*A. Dowling*, for appellees.

**BICKNELL, C. C.**—This was a suit by the appellant against the city of Jeffersonville and its treasurer, to prevent, by injunction, the sale of the appellant's land upon precepts for a street improvement.

Separate demurrers to the complaint for want of facts sufficient were sustained, judgment thereon was rendered for the defendants, and the plaintiff appealed.

The rulings upon the demurrers are the only errors assigned.

The complaint states that the plaintiff owns a tract of land fronting on Second street in said city, of the value of \$3,000, and an adjoining lot of the value of \$1,500, both of which are near a street in said city called Ohio avenue, but do not border thereon; that on the 26th of April, 1881, the common council of said city, without any petition there-

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for, by a vote of two-thirds of its members, ordered Ohio avenue to be improved from the south line of Second street to the north line of Third street, and that the costs thereof should be a lien on the property, lots and parts of lots bordering, fronting, abutting and adjacent to said line of improvement, and that the owners thereof should be liable for their proportion of such costs in the ratio of the front lines of their lots to the whole improved line, to the depth of fifty feet, and that assessments therefor should be made against the owners of such property in the proportion of the fair cash value of each parcel, less the value of the improvements, to be determined by the city engineer; that in pursuance of said order a contract for said improvement was made with Lewis A. Terrell and Charles E. Clark, and the city caused the plaintiff's said lands to be assessed for said improvement \$1,500, without the plaintiff's knowledge or consent, and without any notice to him, he not being a resident of said city; that for non-payment of such assessment the city has issued precepts, under which its said treasurer is about to sell plaintiff's said land. The complaint states six reasons why said land is not liable to assessment and sale. These reasons will be considered hereafter in the order in which they are stated.

The order to improve Ohio avenue was made under section 2 of the act of April 14th, 1881, Acts 1881, chap. 39, which took effect upon its passage, twelve days prior to the date of said order.

This act is entitled "An act to amend sections eight and sixty-nine of an act entitled 'An act to repeal all general laws now in force for the incorporation of cities, \* \* prescribing their powers and rights, and the manner in which they shall execute the same, and to regulate such other matters as properly pertain thereto,' approved March 14th, 1867, and to enlarge the powers of cities as to the construction of sewers." The said act of March 14th, 1867, provides two modes of street improvement, one by a vote of two-thirds of the common

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council, without any petition therefor, and the other, upon the petition of the owners of two-thirds of the whole line of lots and parts of lots bordering on the street.

The said 69th section of said act provided that in all contracts for the improvement of streets "the costs of any such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved, per running foot," and that "the owners of lots bordering on such streets or alleys, or the part thereof to be improved, shall be liable to the contractors for their proportion of the costs, in the ratio of the first line of the lots owned by them to the whole improved line." Under this section the city had no authority to assess any lot-owner unless his lot bordered on the street.

Section 2 of the act of April 14th, 1881, Acts 1881, p. 392, amends the foregoing section 69 by providing that owners of land, within fifty feet of the street, may be assessed whether their land borders on the street or not. The amendment is in the following words: "In making the assessments against such owners for the improvement, the ground shall be assessed across the ground fronting or immediately abutting on such improvement, back to the distance of fifty feet from such front line, whether such ground be subdivided by platting or conveyance, or in any other manner."

In the first place, the complaint claims that this amending section is void, because the title of the act of March 14th, 1881, *supra*, does not exactly repeat the title of the act of 1867, intended to be amended. But the only difference between the title of said act of 1867 and the title given in said amending act of 1881 is, that the latter contains all the words of the former except the word "exercise," for which it substitutes the word "execute." The difference between exercising a power and executing it can not be deemed a substantial variance. The act to be amended is so clearly indicated in the title of the amending act as to preclude any uncertainty or doubt.

In the second place, the complaint asserts that said amend-

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ing section 2 of said act of 1881 is unconstitutional, because it authorizes the assessment of lots and lands not bordering on the streets to be improved, thus enforcing contribution from persons who have no right to petition for such improvement, and because the complaint avers that there is a strip of land along the whole front line of said improvement, between the west line of the plaintiff's said lands and the east line of Ohio avenue, which strip is owned by another party, who has paid all the assessments thereon.

The Legislature has the right to place the streets of a city under the control of its common council, and to authorize their improvement by the common council, and to declare in what manner the owners of lots receiving the benefit of such improvements shall contribute to the costs thereof. There is no violation of any constitutional provision or of natural justice in requiring that all lands within fifty feet back of a street improvement shall be assessed therefor. Such a provision is more equitable than the former law, under which a lot-owner could enjoy the benefit of a street improvement without paying for it, by simply conveying away a strip of his lot along the border of the street.

In the third place, the complaint asserts that said section 2 of the act of 1881, *supra*, is unconstitutional, "Because it vests the apportionment of the assessment for a street improvement in the arbitrary, despotic and final decision of an interested officer of such city, called the civil engineer, who fixes the appraisement without notice to the owner of the lands, for whom, in case of injustice, there is no remedy by appeal or otherwise."

Upon this subject the words of said section 2 are as follows: "All assessments where the ground to be assessed is held by more than one owner, shall be in the proportion of the fair cash value of each parcel, \* to be determined by the city engineer."

The complaint is not correct in stating that there is no appeal. Section 71 of the act of March 14th, 1867, *supra*, pro-

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vides that notice shall be given of the issuing of the precept, and that any owner of lands aggrieved by the precept may, within 20 days after such notice, appeal therefrom, and that such appeal shall state all proceedings by the treasurer, and that upon the trial of the appeal the questions to be determined shall be, Were the proceedings, subsequent to the order directing the work to be done and contracted for, regular? Was a contract made? Was the work done in whole or in part according to the contract? Was the estimate properly made? Here is a sufficient remedy by appeal. An enquiry into the regularity of the proceedings embraces the consideration of the engineer's assessment. The assessments, required by the Legislature in section 2 aforesaid, to be made by the engineer, where the ground to be assessed is held by more than one owner, are the ministerial acts of the engineer. They are required to be "in the proportion of the fair cash value of each parcel, less the value of the improvements." An act is none the less ministerial because the person performing it may have to satisfy himself of certain facts before his duty can be performed. *Flournoy v. City of Jeffersonville*, 17 Ind. 169, and cases there cited.

By section 27 of the act of March 14th, 1867, it is made the duty of the city engineer, to "prepare plans, specifications and estimates, when thereunto directed by the common council, of proposed public improvements, and shall superintend the opening of streets and the preservation of the true lines thereof, and perform all other duties appertaining to his office and directed by the common council." It was within the constitutional power of the Legislature to declare that the new assessments, authorized by section 2 aforesaid, should be made by such an officer. It is not his act in making the assessments which deprives the lot-owner of his property in case of a sale thereof for a failure to pay the assessment, but the property is taken by legally authorized proceedings, in the course of which its owner may have a fair trial and a determination of his rights by an appeal to a court of general juris-

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diction. "The stage of proceedings at which that hearing shall take place; the manner, in short, in which the cause of a party shall be got before the judicial tribunal, so it is not an unreasonably inconvenient and embarrassed one, is with the legislative power." PERKINS, J., in *Flournoy v. City of Jeffersonville*, *supra*. *New Albany, etc., R. R. Co. v. Connelly*, 7 Ind. 32. The case of *Smith v. Duncan*, 77 Ind. 92, cited by appellant, which holds that certain powers granted by the Legislature to the city council can not by them be delegated to the engineer, is not in point here. The duty is expressly imposed upon the engineer by the Legislature, and the right of appeal from the precept sufficiently protects the rights of the property owner.

In the fourth place, the complaint claims that the proceedings were invalid because the improvement of Ohio avenue was not petitioned for by the owners of two-thirds of the whole line of the lots bordering on said street, but was ordered without any petition by a two-thirds vote of the common council, and because the assessment was made and ordered to be collected from the plaintiff without any notice to him thereof. But where an improvement is ordered by a two-thirds vote of council, under section 65 of the act of 1867, *supra*, no petition or notice of the application is required, nor is any notice of the assessment required. The complaint does not allege that the plaintiff was not duly notified of the precepts pursuant to section 71 of the act of 1867, *supra*.

In the fifth place, the complaint alleges that the precepts were illegal and void, because they were issued in favor of both contractors after the death of one of them, Charles E. Clark. It is not alleged that Clark died before the work was completed, nor before the assessment was made. A precept is, in some respects, analogous to an execution. If, after a judgment in favor of two, one of them dies, execution is issued in the name of both. *Carnahan v. Brown*, 6 Blackf. 93; 2 Saund. 50 a. Here, the work having been done by two upon a joint contract, the precepts were issued in the name of

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both. The administrator of the deceased, in such a case, is not a necessary party to the precept. *Willson v. Nicholson*, 61 Ind. 241; *Nicklaus v. Dahn*, 63 Ind. 87.

The appellant contends that the affidavit required to be made by the contractor, under section 3165, R. S. 1881, in order to authorize the issuing of a precept, "must be made by both contractors, or by one at the request or on behalf of both," and that "as Clark was dead he could neither make a request or have an agent." But where such a contract for work is made jointly by two and they do the work jointly, the assessment is for the benefit of both, and they are entitled to a joint precept; and in such a case, upon the subsequent death of either, we think the affidavit to obtain such a precept may be made by the survivor.

In the sixth place, the complaint claims that the statute under which the improvement in question was ordered is unconstitutional and void, because it makes no provision for the assessment of benefits and damages occasioned by said improvement, and is in violation of section 21 of article 1 of the Constitution of Indiana.

That section of the Constitution is as follows: "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

But legislation, such as that here complained of, has been repeatedly held constitutional in Indiana and elsewhere. *Flournoy v. City of Jeffersonville*, *supra*; *New Albany, etc., R. R. Co. v. Connelly*, *supra*; *Palmer v. Stumph*, 29 Ind. 329; *People v. Mayor, etc.*, 4 N. Y. 419, and cases there cited.

The court below did not err in sustaining the demurrers to the complaint.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

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The State v. Cooper.

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No. 11,175.

## THE STATE v. COOPER.

**SURETY OF THE PEACE.—Jurisdiction.**—The circuit court has no original jurisdiction of proceedings for surety of the peace.

From the Lake Circuit Court.

*F. T. Hord*, Attorney General, *J. B. Peterson*, Prosecuting Attorney, *M. Wood* and *T. J. Wood*, for the State.

**HAMMOND, J.**—Prosecution for surety of the peace, commenced by affidavit and information in the court below. The court on the appellee's motion dismissed for want of jurisdiction. The question presented by the record is, Had the court below original jurisdiction in this case?

The statute in reference to prosecutions for surety of the peace makes no provision for their commencement except before justices of the peace. Section 1606, R. S. 1881. It is claimed, however, by counsel for the State, that a prosecution of this kind is a criminal proceeding, and that original jurisdiction is conferred upon the circuit court by section 1314, R. S. 1881, which gives that court "exclusive jurisdiction \* \* \* in criminal cases \* \* \* except where exclusive or concurrent jurisdiction is or may be conferred by law upon justices of the peace."

While the criminal practice largely governs in a proceeding like this, we are of the opinion that the case itself is not a criminal case. The object of the prosecution is not the punishment of crime already committed, but to prevent the commission of crime, or breach of the peace, by requiring persons suspected of future misbehavior to give assurance to the public, by recognizance, that the apprehended offence shall not happen. Hence this proceeding is called *preventive* justice as distinguished from a prosecution for a past offence, which is called *punishing* justice. 4 Bl. Com., p. 251.

In *Murray v. State*, 26 Ind. 141, it was held, in a prosecution for surety of the peace, not error for the court to refuse

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to instruct the jury that it was a criminal prosecution; that the defendant was presumed to be innocent until the contrary was proved, and that, if there was a reasonable doubt of his guilt, he should be acquitted. Although the statute in criminal cases requires the court to charge the jury that the defendant is presumed to be innocent until the contrary is proved, and that he must be acquitted if there is a reasonable doubt whether his guilt is satisfactorily shown, it was said in the above case: "We do not think that this statute applies to a proceeding for surety of the peace. \* \* \* Although this is a criminal proceeding, it is not a prosecution for a crime committed, but a proceeding to prevent the commission thereof."

In *State v. Vankirk*, 27 Ind. 121, it was held that the provision of the Constitution that no person shall be twice put in jeopardy for the same offence, does not apply to a proceeding for surety of the peace.

Section 1314, *supra*, does not, as we think, give circuit courts original and concurrent jurisdiction with justices of the peace in prosecutions for surety of the peace. That section relates to crimes which have been committed, and not to those that are merely apprehended. Nor do we think that concurrent jurisdiction in these prosecutions is conferred upon circuit courts by section 1324, R. S. 1881. That does not apply to circuit courts, but to the judges of such courts, who are authorized, in their respective districts, to take "all necessary recognizances to keep the peace, or to answer any criminal charge or offence in the court having jurisdiction." By section 15 of article 7 (section 175, R. S. 1881), of the Constitution of the State, all judicial officers are made conservators of the peace in their respective jurisdictions. They are also made conservators of the peace by statute, section 1702, R. S. 1881; and by section 2041, R. S. 1881, it is made a misdemeanor for any one, when required by any conservator of the peace to assist him in the execution of his office, or the service of any process, to refuse or neglect to render such as-

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sistance without a valid cause for so refusing or neglecting. Sir William Blackstone says: "The lord chancellor or keeper, the lord treasurer, the lord high steward of England, the lord mareschal, the lord high-constable of England (when any such officers are in being), and all the justices of the Court of King's Bench (by virtue of their offices), and the master of the rolls (by prescription), are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it." 1 Bl. Com., p. 350.

We are of the opinion that the authority of circuit judges to take recognizances, under section 1324, *supra*, can only be exercised by them in their offices as conservators of the peace, and that this section does not confer upon their courts original jurisdiction in prosecutions for surety of the peace.

The court below did not err in sustaining the appellee's motion to dismiss for want of jurisdiction.

Judgment affirmed.

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 No. 10,094.

WILLIAMS ET AL. v. HENDERSON.

RECORD.—*Correcting Misprision.—Practice.*—After a cause has ceased to be *in fieri*, and after the term, the record thereof can only be corrected, if there be some written memorial or minute by which the actual proceedings can be clearly known; and parol evidence alone is never sufficient.

From the Johnson Circuit Court.

R. M. Johnson, for appellants.

W. H. Barnett, G. M. Overstreet and A. B. Hunter, for appellee.

FRANKLIN, C.—Appellee sued appellants upon a promissory note. There was a trial by jury; verdict for the plaintiff, and over a motion for a new trial, on the 12th day of

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130	430
90	577
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90	577
153	90

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December, 1881, judgment was rendered for the plaintiff for the amount of the note and interest. Following the judgment, the record shows that an appeal was prayed to the Supreme Court, and thirty days were given the defendants in which to file bills of exceptions. No bill of exceptions was filed within the thirty days.

On the 2d day of March, 1882, the defendants filed a motion in the court below for a *nunc pro tunc* entry, to change the record so as to read that ninety days were given in which to file bills of exceptions, instead of thirty, which motion was by the court overruled.

The defendants then moved the court to correct the record in this respect, which motion was also overruled.

The record in this cause was filed in this court April 6th, 1882, and the transcript shows that a bill of exceptions was filed March 19th, 1882.

On the 12th day of April, 1882, appellants filed a petition in this court for a mandamus and certiorari to correct the record and have it certified as corrected, which petition was by this court overruled on the 19th day of April, 1882.

On the 24th day of May, 1882, upon the motion and affidavit of appellants, the court awarded a certiorari to have the bill of exceptions certified as corrected by the court below. A return was made to this June 24th, 1882, showing that the bill of exceptions had been presented to the judge on the 11th day of March and filed with the clerk the 18th day of March, 1882. But the record is left standing that only thirty days were<sup>1</sup> given in which to file bills of exceptions which were taken at the trial of the cause.

A bill of exceptions was properly filed as to the overruling of the motions for a *nunc pro tunc* entry, and to correct the record.

The errors assigned are:

1st. The court erred in overruling the motion for a new trial.

2d. Overruling motion for a *nunc pro tunc* entry.

3d. Overruling motion to correct the record.

4th. Overruling motion for *nunc pro tunc* entry to correct record to correspond with the ruling announced by the court at the time of the rendition of the judgment.

All the questions arising under the motion for a new trial are dependent upon the first bill of exceptions. If it is not properly in the record, no question is properly presented by the first specification of errors. It is clear that this bill of exceptions was not presented or filed within the time allowed by the court, as the record now stands, and it becomes necessary to first consider the question as to whether the record should have been amended and changed by the court below.

Nearly three months after the trial and at a subsequent term of the court, based upon an affidavit of appellants' counsel, they filed a written motion for a *nunc pro tunc* entry, and also another motion to correct the record. These motions alleged that when the appeal was prayed for and granted at the time the judgment was rendered, the court gave appellants ninety days' time within which to file bills of exceptions, but through the "inadvertence and mistake of the court the minutes thereof show that but thirty days were granted in which to prepare and file a bill of exceptions, and that the record in said cause shows the same."

Parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry, or to change the record after the proceedings have ceased to be *in fieri*, and after the term at which the record was made. Such amendments can only be made when there is some memorial or other minute of the transaction in the case from which what actually took place in the prior proceeding can be clearly ascertained or known. *Makepeace v. Lukens*, 27 Ind. 435; *Schoonover v. Reed*, 65 Ind. 313. Many other cases in this court to the same purport might be cited.

The second case above named is very similar, though not so strong a case as this against sustaining the motion. There the record did not show that any time was given in which to

file the bill of exceptions, and this court held that it could not be shown by parol evidence alone that time had been given. That was only to supply an alleged omission; this is to create a square contradiction and overthrow the record and all written memoranda by parol evidence. We have found no case that goes to that extent, do not think there is any, or should be any. Records would have but very little force if they could be contradicted and overthrown by parol evidence.

No clerical error or misprision of the clerk is shown. The court made its minutes upon its own docket at the time, and the clerk made up the record accordingly. That record can not be thus changed. And, further, this second bill of exceptions does not show what evidence, if any, was given upon the hearing of the motions, and does not even state that the affidavit upon which the motions were based was given in evidence, or that there was any evidence offered. The record does not show that there was anything before the court upon which the *nunc pro tunc* entry asked for, or the desired correction of the record, could be made. In the absence of the evidence, all reasonable presumptions are in favor of the rulings of the trial court.

There is no error in the overruling of the motions for a *nunc pro tunc* entry, and for correcting the record; and without such amendment or correction it can not be successfully claimed that the first bill of exceptions is properly in the record, and without the bill of exceptions no question is presented upon the motion for a new trial. There is no error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

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The Wabash, St. Louis and Pacific Railway Company v. Rooker *et al.*


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No. 10,545.

**THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY**  
**v. ROOKER ET AL.**

**PLEADING.—Practice.—Harmless Error.**—That a paragraph of complaint contains more than one cause of action, justifies a motion to require them to be stated separately; but to overrule the motion is not available error.

**RAILROADS.—Killing Stock.—Pleading.—Demurrer.—Practice.—Evidence.—Jurisdiction.**—A paragraph of complaint against a railroad company for killing stock, contained two causes of action, of one of which the court had no jurisdiction.

*Held*, that a demurrer, for want of facts, did not reach the defect.

*Held*, also, that evidence in support of the cause of action of which the court had no jurisdiction should have been excluded on objection.

**SAME.**—A complaint under the statute, R. S. 1881, section 4025, against a railroad company for killing stock, which avers that the act was done by "the defendant, or some lessee thereof, or other person unknown to the plaintiff," is bad on demurrer.

From the Hamilton Circuit Court.

*N. O. Ross* and *G. E. Ross*, for appellant.

*T. J. Kane* and *T. P. Davis*, for appellees.

**MORRIS, C.**—The appellees sued the appellant to recover damages for two horses claimed to have been injured, and eight sheep alleged to have been killed, by the locomotives and cars of the appellant, in Hamilton county, at a point on its road where it was not securely fenced. The complaint contains two paragraphs.

The appellant moved the court to require the appellees to separate the several causes of action contained in the second paragraph of the complaint. The motion was overruled. The appellant demurred to each paragraph of the complaint. The court overruled the demurrers. It then answered by a general denial. The cause was submitted to the court for trial. Finding for the appellees. The appellant moved the court for a new trial. The motion was overruled, and judgment rendered for appellees. The rulings of the court upon the several motions and demurrers are assigned as errors.

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125	581
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135	581
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152	581
152	424

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It is alleged in the second paragraph of the complaint, that on the 26th day of March, 1882, eight sheep, the property of the appellees, were killed on the appellant's road by its locomotive and cars, at a point where the road was not securely fenced, etc.; that on the — day of June, 1882, two horses belonging to the appellees were wounded and injured on the appellant's road, etc.; that the animals so killed and injured were of the value of \$300. A bill of particulars is filed with this paragraph, in which the value of the sheep is stated to be \$25, and the damage on account of the injuries to the horses is stated at \$275.

It is clear that this paragraph contains two distinct causes of action. *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324; *Toledo, etc., R. W. Co. v. Tilton*, 27 Ind. 71. The motion of the appellant to require the appellees to state separately the two causes of action contained in this paragraph should have been sustained. But the error was harmless, and can not avail the appellant. See section 341, R. S. 1881; *Rennick v. Chandler*, 59 Ind. 354; *Coan v. Grimes*, 63 Ind. 21.

The appellant insists that the demurrer to the second paragraph of the complaint should have been sustained, because two causes of action are joined in that paragraph, as to one of which the court had no jurisdiction. The ground of demurrer stated is the want of sufficient facts to constitute a cause of action. Assuming, as the argument seems to, that the paragraph contains facts sufficient to constitute two distinct causes of action, the demurrer should be overruled, for the obvious reason that the paragraph does contain sufficient facts. We do not think the demurrer raises the question which counsel insist upon. If, as the appellant contends, the court had no jurisdiction of one of the causes of action the ground of demurrer, to raise the question, should have been the want of jurisdiction, or the question might have been raised by objecting to the evidence introduced on the trial in

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support of the cause of action of which the court had no jurisdiction. *Jeffersonville, etc., R. R. Co. v. Brevoort, supra.*

The appellant further contends that the complaint is fatally defective, because neither paragraph shows that the appellant, its assignee or lessee, or a receiver in possession of the road, or any one else for whose conduct it is responsible, was operating or controlling the locomotive or cars which are alleged to have struck said animals at the time the accident occurred.

After stating that the animals were injured on the appellant's track by a locomotive and cars comprising a freight train, the second paragraph, which is, in this respect, the same in substance as the first, proceeds as follows: "And said locomotive and train of cars, and each of them, were at the time of said respective accidents being run and controlled by said defendant, or some lessee thereof, or other person unknown to the plaintiffs."

There is no direct allegation in either paragraph of the complaint that the lessee, or other person unknown to the appellees, was at the time of said accidents running and operating said road in the name of the appellant, nor in what name it was then run and operated.

Section 4025, R. S. 1881, is as follows: "Any railroad corporation, lessee, assignee, receiver, and other person or corporation, running, controlling, or operating any railroad into or through this State, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act."

It was not the intention of the above section to make railroad companies liable for the acts of parties who, without their authority or consent, take possession of their roads and run and operate them.

In view of the franchises and privileges granted to railroad companies by the State, it is perhaps reasonable and

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just to hold them responsible for the acts of their lessees, assignees and receivers who are appointed with their implied, if not express, consent, and for the acts of such other parties as may run, operate or control their locomotives, cars, etc., with their consent, either express or implied. But to hold a railroad company liable for the acts of a party unknown to it, a mere trespasser it may be, would be as unjust as it would be unreasonable. *Cincinnati, etc., R. R. Co. v. Paskins*, 36 Ind. 380.

It is alleged in the complaint that either the appellant, some lessee of its road, or some person unknown to the appellees, run the locomotives and cars against their property, to their damage. But which of these parties run the locomotives and cars and did the wrong—whether it was the appellant, the lessee of its road, or the unknown party, is not averred. It follows that there is no allegation in the complaint that the appellant, or any one for whose acts it is responsible, did any wrong to the appellees. Such an averment is essential to the appellees' claim. The very essence of their right to recover is, that the appellant, or some one for whose acts it is liable, caused the injury of which they complain. This should have been averred directly and positively.

It is said that the words "or other person unknown," etc., should be regarded as surplusage, and that they might have been stricken out on motion. As well might the court strike out the statement that the locomotive was at the time run by the appellant or by some lessee of the road, leaving the simple allegation that the locomotive was at the time run and controlled by some person unknown. We do not think the phrase "by some person unknown to the plaintiffs" can be regarded as surplusage. Thus to regard it would be to give an entirely new meaning to the complaint.

We also think that this defect in the complaint can be reached by demurrer. The alternative averments neutralize each other, so that there is, in effect, an absence of any alle-

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gation that the appellant had in any way injured the property of the appellees. We think the court erred in overruling the demurrer to the complaint.

**PER CURIAM.**—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at appellees' costs.

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No. 10,142.

**DILLMAN v. DILLMAN ET AL.**

**PLEADING.**—*Supplemental Complaint.—Practice.*—The office of a supplemental complaint is not to supply omissions or defects in the original complaint, but to bring upon the record matters arising after the commencement of the suit.

**EXECUTION.**—*Proceedings Supplementary to.—Pleading.*—In proceedings supplementary to execution, if the affidavit fail to show some necessity for the application, it is insufficient.

**SAME.**—*Appeal.—Transcript, When Filed.—Decedents' Estates.—Statute Construed.*—Section 2455, R. S. 1881, requiring the transcript, on appeal, to be filed in the Supreme Court within ten days after filing the appeal bond, does not apply to appeals in proceedings supplementary to execution, where an executor is required to answer under section 819.

From the Monroe Circuit Court.

*J. W. Buskirk and H. C. Duncan*, for appellant.

*J. H. Loudon and R. W. Miers*, for appellees.

**BLACK, C.**—This was a proceeding supplementary to execution, instituted by the appellant, Harrison M. Dillman, against the appellees, James L. Dillman and Jonathan May, executor of the will of David C. Dillman, deceased.

The appellees jointly, and said executor separately, demurred to the complaint for want of sufficient facts. The demurrers were sustained, and the appellant failing to plead further, judgment was rendered against him for costs. The rulings on the demurrers are assigned as errors.

The judgment was rendered on the 28th of February, 1882.

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The appellant filed an appeal bond March 1st, 1882. On the 14th of April, 1882, the transcript, with the assignment of errors, was filed in the office of the clerk of this court, and at the same time the appellees entered an appearance by their joinder in error. The cause was submitted by the appellees, upon the default of the appellant, May 23d, 1882. A brief was filed by the appellant on the 10th of July, 1882. Said executor, on the 21st of April, 1883, filed a motion to dismiss the appeal as to him, for the reason that the transcript was not filed in the Supreme Court within ten days after the filing of the appeal bond, it being supposed by his counsel that this is such an appeal as is contemplated by section 2455, R. S. 1881.

But said section is not applicable to such an appeal as this, and if it were applicable the appellees would be regarded as having waived their right to ask a dismissal thereunder. See *Hillenberg v. Bennett*, 88 Ind. 540.

It does not appear from the record when this proceeding was commenced. On the 23d of February, 1882, the appellant filed an amended complaint and a supplemental complaint. The former alleged, in substance, that in an action brought by the appellant against the appellee James L. Dillman, in the court below, at its November term, 1881, appellant "recovered judgment for \$512.22, upon which an execution against the property of said James L. Dillman, a resident of said county, was duly issued and remains in the hands of the sheriff of said county unsatisfied; that the said Jonathan May is a resident of said county, and as executor of the will of said David C. Dillman has property in his possession, belonging to the said James L. Dillman, to wit: that under the provisions of the said will the said James L. Dillman was bequeathed and devised an undivided one-half of an undivided two-thirds of" certain real estate described, in Monroe county, "which the said Jonathan May, as such executor, is, by the terms of said will, authorized and directed to sell in such manner as he may think proper, and divide the proceeds thereof between the legatees of said will, the interest of James L.

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Dillman being one-half of two-thirds thereof; that the personal property of said Dillman, deceased, will be about sufficient to pay the debts and legacies of said decedent, leaving to the said James L. Dillman, in the hands of said executor, from the proceeds of the sale of said real estate, about \$900, which, together with the amount already in the hands of the said James L. Dillman subject to be claimed as exempt from execution, exceeds the amount exempt by law from execution." Prayer for an order requiring said executor to appear and answer "concerning said property and said indebtedness, and that he be required to pay the money which may come into his hands from the sale of said property, and belonging to said James L. Dillman, in satisfaction of said execution."

In the supplemental complaint, it was alleged that since the filing of the original complaint and the commencement of this action, said May, as such executor, had sold the lands described in said complaint to one Henry F. Dillman for \$2,800, "which sum he now has in his hands in cash and solvent notes;" that since the bringing of this suit said May "has been appointed and now is the executor of the will of Elizabeth Dillman, deceased; that the said James L. Dillman is also a legatee under said will of said Elizabeth, and said May, as her executor, has in his hands, belonging to the said James L., about \$100; that the said judgment mentioned in the original complaint remains unpaid and unsatisfied; that the execution thereon remains in the hands of said sheriff unsatisfied; and that the amount due said James L. Dillman from said \$2,800, after payment of debts and expenses of administration, will amount to about \$600, which, together with said \$100, and the amount already in the hands of said James L., subject to be claimed as exempt from execution, exceeds the amount exempt by law from execution." Prayer for an order requiring "said Jonathan May, executor as aforesaid of said David C. and Elizabeth Dillman, deceased, to appear and answer concerning said indebtedness, and that he be required

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to pay the money which may come into his hands, belonging to said James L. Dillman, in satisfaction of said execution."

The amended complaint and the supplemental complaint were separately verified by affidavits of the same date.

Under the recent rulings of this court, before the adoption of the code of 1881, it was held that in such a proceeding as this issues of fact might be formed, and a jury trial might be had as a matter of right, and that the application for an order, or affidavit, constituted a complaint, the sufficiency of which might be tested by demurrer. *Banty v. Buckles*, 68 Ind. 49; *Abell v. Riddle*, 75 Ind. 345; *Kissell v. Anderson*, 73 Ind. 485.

By section 822, R. S. 1881, it is now provided that all proceedings, "after the order has been made requiring parties to appear and answer, shall be summary, without further pleadings, upon the oral examination and testimony of parties and witnesses. But the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same."

If the complaint and the supplemental complaint should be treated as in an ordinary civil action, and if the former were found to be wholly without equity, so that no valid judgment could be rendered upon it, the action could not be sustained by the filing of the latter, founded upon matters arising after the commencement of the suit; for the office of a supplemental complaint is not to supply facts which, being necessary to the maintenance of the action, have been omitted from the original complaint, but is to bring into the record new facts, so that the court may render its final judgment upon the facts existing at the time of its rendition.

Whether the two verified applications should be so treated, or, without regard to the names by which they are therein designated, they should be examined together as to the sufficiency of the facts stated in both of them, as if those facts were stated in one affidavit, need not be decided, for we think

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that whether taken singly or together they do not set forth sufficient facts under the statute.

Proceedings supplementary to execution are provided for by section 815, *et seq.*, R. S. 1881. To entitle himself to the relief afforded under this statutory and summary proceeding, the judgment creditor must have a need to resort to it for the satisfaction of his judgment. In all cases an execution must have been issued. Where the proceeding is against the judgment defendant alone, the execution must have been returned unsatisfied in whole or in part (section 815), or after the issuing of an execution an affidavit must be filed to the effect that the judgment debtor has property described, which he unjustly refuses to apply toward the satisfaction of the judgment (section 816). If the purpose be to reach property of the judgment debtor in the possession of another person or corporation, or any debt due to the judgment debtor, there must have been an execution issued, which may or may not have been returned, and there must be an affidavit that such person or corporation "has property of such judgment-debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law" (section 819).

It was alleged here that an execution had been issued, which was still in the hands of the sheriff unsatisfied. It was not alleged that the judgment debtor had property described, which he unjustly refused to apply toward the satisfaction of the judgment. It was intended to institute the proceeding under section 819. It was not made to appear that the judgment defendant had claimed any property as exempt from execution, or that he had no property subject to execution, or that he had not sufficient property subject to execution to satisfy the judgment. It is alleged that the effects sought to be reached, together with the amount already in the hands of the judgment defendant, *subject to be claimed*

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 McFadden, Administrator, v. Fritz *et al.*


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as exempt from execution, exceed the amount exempt by law from execution. Exemption is a privilege which is waived by not claiming it. The judgment was for \$512.22. It does not appear what amount the execution defendant would be entitled to claim as exempt, whether \$300 or \$600. It may have been, consistently with the averments of the verified application, that the execution defendant had in his hands property which he had not refused to apply upon the judgment, and which he had not claimed as exempt, sufficient to satisfy the execution upon which no return had been made, but which was still in the hands of the sheriff.

As this insufficiency of the affidavit will require affirmance of the judgment, we will not examine the question as to the sufficiency of either or both of the verified complaints, in other respects, to require an executor to answer.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

Petition for a rehearing overruled.

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 No. 10,087.

### McFADDEN, ADMINISTRATOR, v. FRITZ ET AL.

**CHATTEL MORTGAGE.**—*Possession by Mortgagor of Goods Mortgaged without Stipulation to Account to Mortgagee for Goods Sold.*—*Fraud—Question of Fact.*—Under the statute, section 4924 (R. S. 1881), a chattel mortgage is not void on its face because it does not require the mortgagor to account for the proceeds of the sales made by the mortgagor of the mortgaged property; fraud, in such a case, is a question of fact for the court or jury. *Mobley v. Letts*, 61 Ind. 11, overruled.

**SAME.**—*Replevin by Mortgagee.*—*Answer.*—*Demurrer.*—In an action of replevin, an answer which sets forth that the title of the plaintiff is as administrator of a mortgagee, and that such mortgage was made with intent to defraud creditors, and setting forth facts constituting fraud, and alleging that the defendant had purchased the goods at a sale on an execution had by a constable, is good on demurrer.

**SAME.**—*Finding of Facts.*—*Possession of Note, Secured by Mortgage, by Mortgagor's Attorney.*—*Delivery of Note and Mortgage.*—A special finding of

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McFadden, Administrator, v. Fritz *et al.*

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facts which shows that A. signed a note payable to B., and signed a chattel mortgage covering certain goods at the same time, to secure such note, and left the note in the possession of his, A.'s, attorney, for safe-keeping, and that it was never delivered to B., that the mortgage was placed of record by A., who paid the recorder's fee; that A. remained in possession of the mortgaged property until defendant purchased it at a sale by a constable, and it does not appear that there was any stipulation to pay the debt in the mortgage, independent of the note, does not show any right to possession in B.'s administrator, who brings an action of replevin against such purchaser.

From the Shelby Circuit Court.

*J. B. McFadden* and *E. S. Stilwell*, for appellant.

*T. B. Adams*, *L. T. Michener* and *G. M. Wright*, for appellees.

FRANKLIN, C.—Appellant sued appellees in an action of replevin for the possession of certain goods. Appellees answered by a general denial and a special paragraph.

A demurrer to the special paragraph was overruled. A reply in denial was filed, and a trial had before the court. At the request of the parties, the court found the facts specially, and stated its conclusions of law. The plaintiff excepted to the conclusions of law, and filed a motion for a new trial, both of which were overruled, and judgment was rendered for the defendants.

The errors assigned in this court are :

- 1st. Overruling demurrer to second paragraph of answer.
- 2d. Overruling exceptions to conclusions of law.
- 3d. Overruling motion for a new trial.

The substance of the answer is that the defendants had purchased the property replevied at a constable's sale, and were the owners thereof; that the only title under which the plaintiff claimed was by virtue of a chattel mortgage; that the mortgage was made to defraud creditors, and was void.

Counsel have discussed the question as to whether the mortgage is void upon its face, for not requiring the mortgagor to account for the proceeds of the sales made by him of the mort-

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gaged property, and appellee has referred us to the case of *Mobley v. Letts*, 61 Ind. 11.

The rule laid down in that case appears to be in accordance with common-law principles and the usual practice of courts. But in a series of cases it has been recently held by this court that under our statute of frauds and perjuries, 1 R. S. 1876, p. 506 (and the 4924th section of the R. S. of 1881, which is the same), "a recorded mortgage, upon its face, can not be declared fraudulent and void as against creditors; that fraud, in such a case, is a question of fact, to be submitted to the court or jury upon the trial." See the cases of *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Lockwood v. Harding*, 79 Ind. 129; *McLaughlin v. Ward*, 77 Ind. 383.

In the answer in controversy, it is not only positively averred that the mortgage under which appellant claims title was made to defraud creditors and is void, but the facts constituting the fraud are therein set forth. We think this sufficient to submit the question of fraud in the mortgage to the court or jury on the trial of the cause, and there is no error in overruling the demurrer to the second paragraph of the answer.

The special findings of the court and its conclusions of law are as follows:

"1st. On the 9th day of January, 1879, George D. Nichols called upon James B. McFadden, a practicing attorney of Shelby county, and advised with him touching the best mode of securing to Joseph Nichols" (the father of George D.), "of Providence, Rhode Island, an indebtedness of \$550, borrowed by George from his father, about February, 1878.

"2d. McFadden, at the instance and request of George D. Nichols, drew up a promissory note of the date of January the 9th, 1879, payable to Joseph Nichols three years after date, without relief from valuation or appraisement laws, which was signed by the said George D. Nichols, and left with the said McFadden, as his attorney, for safe-keeping, subject to his order, and which McFadden deposited in his safe.

"3d. At the same time the said George D. Nichols signed



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McFadden, Administrator, v. Fritz *et al.*

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stituted in the name of Joseph Nichols, at the instance of George D. Nichols; that afterwards, Joseph Nichols died at the city of Providence, Rhode Island, testate, and on the 26th day of March, 1880, the said cause was dismissed and a return of the property awarded to the defendants, Fritz *et al.*, on the same day the plaintiff, McFadden, applied to the proper court and was appointed administrator of the estate of said Joseph Nichols in the State of Indiana. Upon the same day, McFadden called upon George M. Wright, the attorney of Fritz *et al.*, and, by agreement of Wright and McFadden, the property was retained by said McFadden, so as to dispense with delivery of the property to Fritz, and then making a demand therefor, and then taking said property by writ of replevin, which McFadden said he intended to do, who brought this suit on the 26th day of March, 1880, and who now has possession of said property; that some of the property included in the chattel mortgage, to wit: One horse, some cigars and tobacco and other small items, have been sold by George D. Nichols, and the proceeds thereof appropriated to his own use, but Joseph Nichols knew nothing about the same.

"I find that by reason of the note described in the mortgage having never been delivered to Joseph Nichols, and having never passed from under the control of George D. Nichols to any one, no valid note and mortgage were ever executed between George D. and Joseph Nichols; and that this plaintiff, as the administrator of Joseph Nichols, can claim nothing as against these defendants by reason of the chattel mortgage. I find for the defendants, and assess the value of the property at \$141.25."

To which conclusions of law the plaintiff excepted.

The special findings state that upon the signing of the note and mortgage by George D. Nichols, he left the note with his attorney for safe-keeping, and the attorney put it into his safe; that it never was delivered to Joseph Nichols, or any one for him, whereby George D. Nichols could be charged

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McFadden, Administrator, v. Fritz *et al.*

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with it. And as to the mortgage, when it was signed, George D. Nichols took it to the recorder's office, had it recorded and paid the fee therefor. After appellees had purchased the property, at the instance of George D. suit was commenced in the name of Joseph Nichols to replevy the property, when Joseph Nichols died, and the suit was dismissed. These findings inferentially show that Joseph Nichols never had accepted the mortgage, he being a non-resident. And if the mortgage had been accepted, the findings do not show that the mortgage contained any promise to pay the debt independent of the note.

In considering conclusions of law, facts not found are considered as not having been proved, and are to be held as against the party upon whom rested the burden of proof.

We find no error in the court's conclusions of law upon the facts stated.

The reasons stated for a new trial are: The findings are not sustained by the evidence, and are contrary to law.

We have examined the evidence carefully, and considered it under all the circumstances proved in the case, and we think it strongly tends to support the findings of the court, and that they were not contrary to law. There was no error in overruling the motion for a new trial.

We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Opinion filed at the November term, 1882.

Petition for a rehearing overruled at the May term, 1883.

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Maxwell, Executor, v. Evans *et al.*

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No. 8219.

## MAXWELL, EXECUTOR, v. EVANS ET AL.

**BANKRUPTCY.**—*Partnership.*—*Trusts.*—*Fraud.*—The phrase “fiduciary character,” in sec. 5117, R. S. U. S., applies only to technical trusts, and not to agents, bailees or factors; nor will the fraud of a partner prevent the discharge of a bankrupt, himself guilty of no act involving moral turpitude.

**PLEADING.**—*Statute.*—*Exception to.*—If an enacting clause of a statute contains an exception, it must be negated by the pleader who seeks to bring his case within the statute; if clearly negated by the facts pleaded, it is sufficient without express words.

From the Parke Circuit Court.

*D. H. Maxwell* and *S. D. Puett*, for appellant.

*R. S. Tennant* and *L. D. Thomas*, for appellees.

**ELLIOTT, J.**—The complaint of the appellant charges that the appellees were private bankers; that she deposited with them bonds of the United States for safe-keeping; that they agreed with her to keep the bonds safely, to detach and collect for her the coupons; that they fraudulently appropriated the bonds and coupons to their own use. To this complaint Evans answered, admitting that his co-defendants were his partners as charged, and averring that the bonds were left in charge of the defendant William S. Magill; that, of the possession or sale of the bonds by Magill, he, Evans, had no knowledge whatever; that there were no entries on the partnership books showing the receipt or sale of the bonds; that in December, 1874, the members of the partnership were adjudged bankrupts; that appellant's claim existed on and prior to that time; that she filed it against the bankrupt's estate and received a dividend; that afterwards the appellee was duly awarded a discharge.

It is no doubt true that where an exception is contained in the enacting clause of a statute, it must be negated by the pleader who seeks to bring his case within the statute, but it is not necessary that this should be done in express words; it is sufficient if the facts pleaded clearly negative the exception.

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Maxwell, Executor, v. Evans *et al.*

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The phrase "fiduciary character," as used in section 5117 of the bankrupt law of 1867, means only technical trusts; it does not apply to the cases of agents, bailees or factors. *Du Pont v. Beck*, 81 Ind. 271; *Palmer v. Hussey*, 87 N. Y. 303; *Scott v. Porter*, 93 Pa. St. 38; S. C., 39 Am. R. 719, auth. n.

The provision in section 5117 of the bankrupt law, which declares that "No debt created by the fraud or embezzlement of the bankrupt," shall be discharged by the bankruptcy proceedings," does not apply to one who is himself guilty of no wrong, although he may be liable for loss resulting from the fraud because of his relations to the person by whom it was perpetrated. That provision operates upon the guilty and not upon the innocent. It was not the intention of Congress to deny to honest men the benefit of the law, but to prevent dishonest men from escaping the consequences of their own corrupt acts, by securing a discharge under its provisions. A man may be liable to an action for the fraud of his agent or partner, and yet be himself free from any participation in the fraud. One partner may be an embezzler and amenable to punishment, and the other be guiltless of wrong, but yet liable in a civil action for loss resulting from his partner's crime. It by no means follows that because a man is liable to a civil action for the fraud of his partner, he is also liable to suffer punishment for that fraud, or that he is to be denied rights accorded to honest men because of the partner's guilt. The courts are well agreed that the provision under immediate mention is to be restricted to cases of actual and positive fraud. In *Neal v. Clark*, 95 U. S. 704, the court, after speaking of the association of the word *fraud* with the word *embezzlement*, said: "Such association justifies, if it does not imperatively require, the conclusion that the 'fraud,' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." To the same effect is our own case of *Hamilton v. Reynolds*, 88

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Maxwell, Executor, v. Evans *et al.*

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Ind. 191, where it was held that the fraud meant by the bankrupt law is such as involves intentional wrong. These cases illustrate the current of judicial thought, and to them we add *Shattuck v. Haworth*, 91 Pa. St. 449; *Palmer v. Hussey*, *supra*; *Hennequin v. Clews*, 77 N. Y. 427 (33 Am. R. 641). It can not be justly held of one who is bound to respond in damages because he is the partner of another, that he must, for that reason, suffer all the consequences of that other's fraud. Still less reason is there for affirming that one who has done no corrupt act, but has had the misfortune to become associated with a dishonest partner, is guilty of fraud involving moral turpitude and intentional wrong, because an act involving these elements has been done by the partners. So far as concerns the character of the fraudulent act, it affects solely the person by whom it was done; it does not affect the mind or morals of the person whose only relation to the act is that he is the business partner of the wrong-doer.

The debt is created by a fraud in cases where one partner, without the knowledge of his copartners, fraudulently appropriates money entrusted to the keeping of the firm; but the moral wrong is solely on the part of the partner who makes the fraudulent appropriation; for there can be no moral turpitude on the part of the partner who is entirely ignorant of the receipt and appropriation of the money. If, then, the law excludes only those who are guilty of moral wrong, it can not reach a partner entirely innocent of the fraud of his copartner. A debt may be created by fraud, or arise out of a technical trust, and yet persons liable for the debt may, nevertheless, receive the benefit of the bankrupt law. *McDonald v. State, ex rel.*, 77 Ind. 26.

We regard the answer as sufficient, and as that of Samuel Magill is, in legal effect the same, it is also held good.

There is no showing that the bill of exceptions was filed within the time given by the court, and, consequently, it can not be regarded as forming a part of the record.

Judgment affirmed.

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Koons v. Williamson et al.

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No. 10,684.

## KOONS v. WILLIAMSON ET AL.

**JUSTICE OF THE PEACE.—Complaint.**—A complaint before a justice of the peace, alleging that the defendants “are indebted to the plaintiff for money had and received at their special instance and request, in the sum of \$100, which is due and unpaid,” is sufficient.

**SAME.—Misjoinder of Causes.—Dismissal.**—Misjoinder of causes of action before a justice of the peace does not warrant a dismissal of the suit.

**SUPREME COURT.—Appeal.—Final Judgment.**—A judgment of the circuit court, that “the cause of action is dismissed at the costs of the plaintiff,” is final, and an appeal may be taken therefrom.

From the Jay Circuit Court.

*D. T. Taylor* and *J. M. Smith*, for appellant.

*J. M. Haynes* and *S. W. Haynes*, for appellees.

**MORRIS, C.**—This suit was commenced before a justice of the peace. The justice, upon the motion of the appellees, dismissed the action for want of a sufficient complaint, and rendered judgment against the appellant for costs. Koons appealed to the circuit court.

In the circuit court the appellees filed a written motion asking the court to dismiss the action for the reason that no sufficient complaint had been filed before the justice, and because there was a misjoinder of causes of action. The record states that the court sustained the motion to dismiss the action, and then proceeds as follows: “To which ruling of the court the plaintiff excepts, and the cause of action is dismissed at the costs of the plaintiff.”

The first paragraph of the complaint is as follows:

“Andrew J. Koons, plaintiff in this suit, complains of the defendants Andrew J. Williamson, Thomas J. Draggoo, Joseph H. Roll, Thomas Lyons, Daniel S. Hopkins, Samuel L. Williams and James H. Williamson, partners doing business in the firm name and style of The Oriental Marriage Dowry Association of Red Key, Indiana, and says that said defendants are indebted to him, the said plaintiff, for money had

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Koons v. Williamson *et al.*

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and received at their special instance and request, in the sum of one hundred dollars, which is due and unpaid, for which he demands judgment and other proper relief."

We think this paragraph states a good cause of action. The averment that the appellees are indebted to the appellant in the sum of \$100 for money received is equivalent to an allegation that it was received by the former for the use of the latter, and this is so obvious that no one could fail to understand it or be misled by it. If it was not so received, then the appellees were not, as averred, indebted to the appellant.

In the case of *Milholland v. Pence*, 11 Ind. 203, the complaint was as follows: "William Pence, Dr. to Joseph Milholland, thirty dollars for one gun obtained, by fraud." It was not expressly alleged in this cause of action that the gun belonged to the plaintiff, nor that the defendant had obtained it by fraud; but, as in the case now before us, the facts were as forcibly alleged by necessary implication as if they had been expressly averred. If the appellees deemed the complaint uncertain, they should have asked, not that the action be dismissed, but that the complaint be made more certain. We think the complaint was sufficient. *Alexander v. Gaar*, 15 Ind. 89, 91.

The appellant contends that there was no such judgment in the case as can be appealed from. We think otherwise. The judgment of the court, as stated in the record, is in these words: "The cause of action is dismissed at the costs of the plaintiff." The entry of the judgment is not as formal as it might be, but the form of the entry expresses in the fewest words just what the court adjudged and did. The judgment of dismissal, as expressed in the record, is sufficient and valid, and the judgment for costs is in the usual form. The clerk ascertains the amount of the costs. *Palmer v. Glover*, 73 Ind. 529.

It is also insisted by the appellees that the second paragraph is founded upon tort, and that there was, therefore, a misjoinder of causes of action. Granting this, it affords no

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Harring v. Nowlin *et al.*

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ground for dismissing the action. The appellees might, perhaps, have properly required the misjoined causes of action to be docketed and tried separately; this they did not ask. We think the court below erred in dismissing the action.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

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No. 10,425.

## HARRING v. NOWLIN ET AL.

From the Dearborn Circuit Court.

*G. M. Roberts*, for appellant.

FRANKLIN, C.—Appellees commenced this suit against one Henry Jackson, for the possession of certain real estate. Jackson answered that he was only a tenant, and that the land was owned by appellant, Harring, and Hunter & Dunn. They were made defendants, appeared and filed a cross complaint against the plaintiffs, alleging that they were the owners of the real estate in controversy; that said Jackson, after the commencement of the suit, had abandoned the possession of the land, and that the plaintiffs had wrongfully taken possession, and prayed for a judgment for possession against plaintiffs.

There was a trial by jury, and verdict, with answers to interrogatories, in favor of the plaintiffs.

Over a motion for a new trial judgment was rendered for the plaintiffs.

The error assigned is the overruling of the motion for a new trial.

Appellees have filed no brief, and the only reason for a new trial insisted upon in appellant's brief is, that the verdict is not sustained by the evidence.

Appellant, in his brief, says that he is aware of the rule of this court "that it will not disturb the verdict of the jury upon the grounds alone of the weight of the evidence, unless it is manifestly unjust." Where there is evidence tending to support the verdict of the jury, this court can not say that the verdict is manifestly unjust, without weighing the evidence. And this court has repeatedly held that where there is evidence tending to support the verdict, they will not weigh the evidence in order to determine its preponderance.

We have examined the evidence, and think it tends to support the verdict. Where evidence is conflicting, it is for the lower court, and not this court, to reconcile the conflicts.

There is no available error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

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McCann v. Rodifer et al.

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No. 10,533.

## WISEMAN v. WILLIAMS ET AL.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellant.

D. Moss and R. R. Stephenson, for appellees.

MORRIS, C.—The appellant commenced this suit against the appellees for the purpose of procuring partition of forty acres of land in Hamilton county.

She alleges in her complaint that she was married to John Wiseman in the year 1828, and continued to be his wife until his death, which occurred in 1876; that in 1847 he became the owner in fee of the land in controversy; that in 1854 he conveyed the same to one Jones, who conveyed to the appellees; that she did not join in such conveyance, nor in any conveyance of said land. She avers that, as the widow of said John Wiseman, deceased, she is the owner of the undivided one-third of said land, and that the appellees own the other two, and that she and they hold the same as tenants in common. She prays partition, etc.

To this complaint the appellees answered in one paragraph, setting up, in substance, the facts alleged by the defendant in the case of *Wiseman v. Beckwith*, ante, p. 185.

The appellant demurred to the answer; the court overruled the demurrer, and the appellant electing to stand by her demurrer, final judgment was rendered for the appellees.

The ruling of the court upon the demurrer to the answer is assigned as error.

The question presented for decision in this case is the same as in the case of *Wiseman v. Beckwith*, supra. According to the ruling in that case the answer is good, and the court did not err in overruling the demurrer to it.

PER CURIAM.—It is ordered that the judgment below be affirmed, at the costs of the appellant.

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No. 9584.

## McCANN v. RODIFER ET AL.

From the Boone Circuit Court.

J. W. Clements and O. P. Mahan, for appellant.

C. S. Weener, for appellee.

HOWK, J.—The paper writing filed in this cause by the appellant, and endorsed as his brief, is merely a copy of the pleading in the record. It suggests no reason for the reversal of the judgment, it makes no argument, and it cites no authority. It is not a brief of the cause within the requirements of the rules and decisions of this court. *Bray v. Franklin Life Ins. Co.*, 68 Ind. 6; *Wilson v. Holloway*, 70 Ind. 407; *City of Anderson v. Neal*, 88 Ind. 317.

The judgment is affirmed, with costs.

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#### ATTORNEY AND CLIENT.

See CRIMINAL LAW, 1; PAYMENT, 3; PRACTICE, 3.

1. *Liability of Attorney for Want of Skill or Care.*—An attorney whose ignorance or carelessness results in loss to his client is liable in damages to the client. *Jones v. White, 255*
2. *Same.—Complaint.—Negligence.*—A complaint against an attorney to recover damages for loss shown to have resulted from the ignorance and negligence of the attorney need not show that the plaintiff was without fault. *Ib.*

#### AUDITOR OF STATE.

See COUNTY COMMISSIONERS, 1 to 4.

#### BANKRUPTCY.

*Partnership.—Trusts.—Fraud.*—The phrase "fiduciary character," in sec. 5117, R. S. U. S., applies only to technical trusts, and not to agents, baillees or factors; nor will the fraud of a partner prevent the discharge of a bankrupt, himself guilty of no act involving moral turpitude. *Maxwell v. Evans, 596*

#### BILL OF EXCEPTIONS.

See COSTS, 1; JUDGE, 2; SUPREME COURT, 1, 3.

1. *Practice.—Filing Bill of Exceptions.—Certificate of Clerk.*—It sufficiently appears that a bill of exceptions was filed within the time limited, if the certificate of the clerk authenticating the transcript containing it bears date within the time. *Stout v. State, 1*
2. *Evidence.—Record.—Short-Hand Reporter.—Statute Construed.*—A bill of exceptions did not purport to contain the evidence, but recited that the court below had ordered that the evidence taken by the reporter be made part of the record, "and the clerk of this court is ordered in any transcript that may be made for the Supreme Court to incorporate the annexed report of such evidence;" this was followed by what purported to be a report of the evidence certified by the reporter and verified by his oath. *Held*, that the evidence was not, under the statute, R. S. 1881, section 1405, before the Supreme Court. *Brehm v. State, 140*
3. *Transcript.—Striking out Pleadings.—Supreme Court.—Record.*—When the court strikes out a pleading, it ceases to belong to the record, and it can become a part of the record again only by being incorporated in a bill of exceptions, and if this be not done the clerk should not insert it in a transcript for the Supreme Court. *Board, etc., v. Karp, 236*
4. *Same.*—A paper which is no part of the record, unless made so by bill of exceptions, must be found in the bill itself, else it will not be re-

garded by the Supreme Court. A mere reference in the bill to a paper copied in the record but which is not a part thereof by force of the statute is not sufficient. *Ib.*

5. *Filing.—When Part of Record.—Supreme Court.*—Under section 629, R. S. 1881, a bill of exceptions, when filed, becomes a part of the record, and, unless the transcript shows, in some manner, the filing of the bill, it can not be considered in the Supreme Court as constituting a part of the record. *Loy v. Loy, 404*
6. *Judgment.—Evidence.—Presumption.*—Where a bill of exceptions shows an offer of the record of a judgment as evidence, and that an objection thereto was overruled, and immediately thereafter in the bill there appears a transcript of such a judgment, it will be presumed, in the absence of anything to the contrary, that the record of the judgment was read in evidence. *Leary v. New, 503*

#### BOND.

See HIGHWAY, 1, 2; PARTITION, 1 to 4; REPLEVIN, 1, 2.

1. *Breaches of.—Pleading.—Practice.*—In a suit upon a bond with conditions, several separate breaches may be assigned in a single paragraph of complaint, and demurrers may be addressed to single breaches. *McFall v. Howe, etc., Co., 148*
2. *Same.—Construction.—Principal and Surety.—Notice.*—A bond with sureties, to secure the fidelity of an agent, stipulated that it should continue in force till terminated by notice in writing, signed by all the obligors. Such notice signed by one of the sureties was given. *Held*, that the notice did not terminate the liability of any of the obligors. *Ib.*
3. *Same.—Bond of Agent.—Evidence.*—Where a bond is executed to secure the performance of duty as agent in a specified business, and to secure from him a due accounting for all money received in such business, it is necessary for the obligee in a suit on the bond to show by evidence a breach of duty in the business designated in the bond or a failure to account for money received in the course of such business. *Ib.*

#### BOUNDARIES.

See REAL ESTATE, ACTION TO RECOVER, 3 to 5.

1. *Survey.—Evidence.*—Where adjoining land-owners cause the division line between them to be surveyed and established, such survey conclusively establishes such line, and is binding alike upon them and all who claim under them. *Main v. Killinger, 165*
2. *Same.—Agreement.—Possession and Occupancy.—Title.—Prescription.*—When such proprietors agree upon a division line, and one takes possession and occupies the land to such line, peaceably and undisturbed, under claim of title, for more than twenty years, such possession divests the other of any title that he may have had to the land so occupied. *Ib.*
3. *Same.—Adverse Possession.—Statute of Limitations.*—When parties agree upon such line, and each occupies to such line for more than twenty years, such agreement and occupancy give title to the line without reference to the true line. *Ib.*

#### BRIBERY.

See CONTEMPTS, 2.

#### BRIEF.

See SUPREME COURT, 15.

#### BUILDING AND LOAN ASSOCIATION.

See AGREED CASE, 4.

CASES CRITICISED, DISTINGUISHED, FOLLOWED, LIMITED AND OVERRULED.

- Mobley v. Letts*, 61 Ind. 11, holding void, upon its face, a chattel mortgage where goods are left for sale in possession of mortgagor, overruled. *McFadden v. Fritz*, 590
- Bates v. Kuhn*, 12 Ind. 355, in relation to costs where judgment is less than \$50, criticised. *Moore v. Newland*, 409
- Board, etc., v. Hon*, 87 Ind. 356, as to statement of claim before county commissioners, overruled. *Board, etc., v. Ritter*, 362
- Campbell v. Dwiggins*, 83 Ind. 473, and *Tyler v. State, ex rel.*, 83 Ind. 563, in relation to repair of ditches by township trustees, distinguished. *Ingerman v. Noblesville Tp.*, 393
- Waldo v. Wallace*, 12 Ind. 569, *Gulick v. New*, 14 Ind. 93, *Howard v. Shoemaker*, 35 Ind. 111, as to eligibility to office not judicial, limited. *Smith v. Moore*, 294
- Bundy v. McKnight*, 48 Ind. 502, as to instructions in reference to execution of will and sanity of testator, followed. *Vanvalkenberg v. Vanvalkenberg*, 433
- Oliver v. Pate*, 43 Ind. 132, in reference to cross-examination of witness, distinguished. *McDonel v. State*, 320
- Strong v. Clem*, 12 Ind. 37, as to rights of widow, followed as an established rule of property. *Wiseman v. Beckwith*, 185
- Smith v. Duncan*, 77 Ind. 92, in relation to assessments for street improvements by city engineer, distinguished. *Ray v. Jeffersonville*, 567
- Jarrell v. State*, 58 Ind. 293, as to definition of reasonable doubt followed. *Stout v. State*, 1

CHAMPERTY.

1. *Conveyance.—Tenants in Common.—Adverse Possession.*—The possession of a tenant in common, claiming the whole by virtue of a conveyance of the whole to him by warranty deed, will not make champertous a conveyance by other tenants in common of their undivided shares. *Elliott v. Frakes*, 389
  2. *Same.—Real Estate, Action to Recover.—Answer.*—In a suit for possession of lands, and to quiet title, the defendant answered that when the plaintiff took conveyance the defendant was in possession, under a deed of the premises, with full covenants, by virtue of which he was claiming the lands.
- Held*, that the answer was bad for failure to aver that the defendant entered, believing in good faith that he had title. *Ib.*

CHANGE OF VENUE.

See CRIMINAL LAW, 12, 13, 16, 20.

CHATTEL MORTGAGE.

1. *Where to be Recorded.*—It is essential to the validity of a chattel mortgage as against creditors, that it should be recorded in each of the counties where the mortgagors severally reside. *Granger v. Adams*, 87
2. *Same.—Mortgage Executed by Partners.*—A chattel mortgage executed by partners must, as against creditors, be recorded in all the counties wherein the partners reside, and it is not sufficient to record it in the county where one partner resides and the firm does business. *Ib.*
3. *Foreclosure.—Parties.*—In a suit to foreclose a chattel mortgage, the mortgagor, having sold the chattel and having no interest therein, is not a necessary party defendant. *Farnsley v. Anderson, etc., Works*, 120
4. *Possession by Mortgagor of Goods Mortgaged without Stipulation to Account to Mortgagee for Goods Sold.—Fraud.—Question of Fact.*—Under the statute, section 4924 (R. S. 1881), a chattel mortgage is not void on its

face because it does not require the mortgagor to account for the proceeds of the sales made by the mortgagor of the mortgaged property; fraud, in such a case, is a question of fact for the court or jury.

*McFadden v. Frits*, 590

5. *Same.—Replevin by Mortgagee.—Answer.*—In an action of replevin, an answer which sets forth that the title of the plaintiff is as administrator of a mortgagee, and that such mortgage was made with intent to defraud creditors, and setting forth facts constituting fraud, and alleging that the defendant had purchased the goods at a sale on an execution had by a constable, is good on demurrer. *Ib.*
6. *Same.—Finding of Facts.—Possession of Note, Secured by Mortgage, by Mortgagor's Attorney.—Delivery of Note and Mortgage.*—A special finding of facts which shows that A. signed a note payable to B., and signed a chattel mortgage covering certain goods at the same time, to secure such note, and left the note in the possession of his, A.'s, attorney, for safe-keeping, and that it was never delivered to B., that the mortgage was placed of record by A., who paid the recorder's fee; that A. remained in possession of the mortgaged property until defendant purchased it at a sale by a constable, and it does not appear that there was any stipulation to pay the debt in the mortgage, independent of the note, does not show any right to possession in B.'s administrator, who brings an action of replevin against such purchaser. *Ib.*

#### CHOSE IN ACTION.

See DECEDENTS' ESTATES, 5 to 7.

#### CITIZENSHIP.

See JUROR.

#### CITY.

See INTOXICATING LIQUOR; SCHOOL REVENUE, 2.

1. *Constitutional Law.—Amendment of Statute.—Title of Act.—Description of.*—Section 2 of the act of April 14th, 1881 (Acts 1881, p. 392), which act is amendatory of a former act, is not unconstitutional because the title of such amendatory act substitutes the word "execute" for "exercise," in reciting the title of the former act, in the following context: "An act to amend sections eight and sixty-nine of an act entitled 'An act to repeal all general laws now in force for the incorporation of cities, \* \* \* prescribing their powers and rights, and the manner in which they shall execute the same,' etc." *Ray v. Jeffersonville*, 567
2. *Same.—Assessment of Lands not Bordering on Street Improved.*—Said section 2 is not unconstitutional because it authorizes the assessment of lands not bordering on the street to be improved, the same being within fifty feet of such improvement. *Ib.*
3. *Same.—Apportionment of Assessment by Engineer.—Right of Appeal.*—Said section 2 is not open to the objection of cutting off all right of appeal from the apportionment of the assessment by the city engineer; section 71 of the act of March 14th, 1867, gives such appeal. *Ib.*
4. *Same.—City Engineer.—Assessment by.—Ministerial Act.*—The assessment required to be made by the city engineer under said section 2 is a ministerial act which the Legislature had the power to impose on such officer, and it is not his act which deprives the lot-owner of his property in event of sale. *Ib.*
5. *Same.—Common Council.—Improvement of Streets.—Notice.*—Under section 65 of the act of March 14th, 1867, a street improvement may be ordered by a two-thirds vote of the common council, without a petition of the property-holders, nor is any notice of the assessment required. *Ib.*
6. *Same.—Joint Contractors.—Death of One.—Precept.—Affidavit.*—Where the work in improving a street is completed by two joint contractors, and

after the assessment is made one dies, a precept may issue thereafter in favor of both, and the affidavit to obtain such precept may be made by such survivor. *Ib.*

7. *Same.*—*Constitutional Law.*—*Statute Construed.*—*Assessment of Benefits and Damages.*—The statute is not unconstitutional because it makes no provision for the assessment of benefits and damages occasioned by such improvements. *Ib.*

CITY ENGINEER.

See CITY, 3, 4.

CLERK OF CIRCUIT COURT.

See BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 16, 20.

COLLATERAL ATTACK.

See DECEDENTS' ESTATES, 1; DRAINAGE, 1; HIGHWAY, 6; RAILROAD, 4.

COLLATERAL SECURITY.

See PAYMENT, 1, 3.

COMMON CARRIER.

*Special Contract.*—*Evidence.*—*Variance.*—Where suit is brought against a common carrier to recover damages for the non-delivery of goods received by it for carriage, and the complaint merely alleges a breach of the common-law duty of such carrier, if the evidence show that the goods were received for carriage under a special written contract, which was not declared upon, the variance is fatal, and the plaintiff can not recover. *Hall v. Pennsylvania Co., 459*

COMMON SCHOOLS.

See SCHOOL REVENUE; TOWNSHIP TRUSTEE, 2 to 4.

CONSIDERATION.

See CONTRACT, 2; FRAUDULENT CONVEYANCE, 2, 3; MORTGAGE, 10; TOWNSHIP TRUSTEE, 2.

CONSTITUTIONAL LAW.

See CITY, 1, 2, 7; CRIMINAL LAW, 3; DRAINAGE, 2; OFFICE AND OFFICER; TOWNSHIP TRUSTEE, 1; VENDOR AND VENDEE.

CONTEMPTS.

1. *Legislative Power to Define.*—The power to protect itself from contempts and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and it is not in the power of the Legislature to prevent the one or abridge the other. *Little v. State, 338*
2. *Same.*—*Proposal to Bribe Juror or Officer of Court.*—An attempt, for the purpose of gain, to create the belief that a juror or an officer of court having active duties to perform upon a trial, can be bribed, is a contempt of court. *Ib.*

CONTINUANCE.

See SUMMONS.

CONTRACT.

See COMMON CARRIER; COUNTY COMMISSIONERS, 7, 8; HUSBAND AND WIFE, 1; MORTGAGE, 10; PARTITION, 5, 6; PARTNERSHIP; PLEADING, 5; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE; SALE; TOWNSHIP TRUSTEE, 5; VENDOR AND VENDEE.

1. *Waiver of Condition.*—A written contract provided that the plaintiff should furnish the defendant 1,000,000 feet of lumber, described, 150,000 feet deliverable per month, commencing at a date fixed, at J., to be paid for on arrival with bill of lading, etc.; a single shipment only was

made, three months after the time fixed for the first delivery, no bill of lading accompanying it, but the lumber was received without objection. *Held*, that the receipt of the lumber was a waiver of the conditions concerning time of delivery and bill of lading, and that the plaintiff could recover upon the contract. *Ohio, etc., Co. v. Menzies, 83*

2. *Statute of Frauds.—Consideration.—Moral Obligation.—Deed.*—A parol promise which, by reason of the statute of frauds, can not be enforced, if the circumstances be such as to impose a moral obligation, will be a sufficient consideration to support a conveyance of lands.

*Sedgwick v. Tucker, 271*

#### CONTRIBUTION.

See PRINCIPAL AND SURETY, 1 to 3.

#### CONVERSION.

See CRIMINAL LAW, 17; GUARDIAN AND WARD.

#### CONVEYANCE.

See CHAMPERTY; CONTRACT, 2; DECEDENTS' ESTATES, 10 to 14; EVIDENCE, 5; HUSBAND AND WIFE, 2; MARRIED WOMAN; PLEADING, 3; REPLEVIN BAIL; TRUST AND TRUSTEE, 2, 3; VENDOR AND VENDEE.

#### CORPORATIONS.

See AGREED CASE, 4; CITY; GRAVEL ROAD; RAILROAD; SCHOOL REVENUE, 2; TOWNS.

*Answer.—Nul Tiel Corporation.—Continuance of Corporation.—Presumption.*—Where an answer of *nul tiel corporation* admits the previous existence of a corporation, and alleges no facts sufficient to show that it has ceased to exist, it will be presumed that it is still a corporation and in the possession of its corporate rights, property and franchises.

*Darrell v. Hilligoss, etc., G. R. Co., 264*

#### COSTS.

See HABEAS CORPUS, 6; SUBROGATION.

1. *Bill of Exceptions.—Supreme Court.*—The ruling upon a motion to tax costs must be preserved by a bill of exceptions, in order to present any question upon such ruling in the Supreme Court. *Leffel v. Obenchain, 50*
2. *Amount of Recovery.—Statute Construed.*—In a suit for a money demand on contract, begun in the circuit court, the plaintiff recovered five dollars. There was no set-off, counter-claim, or payment pleaded, and nothing demanding affirmative relief for the defendant.

*Held*, under sections 590 and 591, R.S. 1881, that all costs should be taxed to the plaintiff, and what is said in *Bates v. Kuhn, 12 Ind. 355*, to the contrary, was not necessary to that case, and is in conflict with the statute and with several prior and subsequent cases. *Moore v. Newland, 409*

#### COUNTER-CLAIM.

See PLEADING, 4.

#### COUNTY AUDITOR.

See COUNTY COMMISSIONERS, 1 to 4.

#### COUNTY COMMISSIONERS.

See TOWNSHIP TRUSTEE, 5.

1. *Erroneous Payments by County Treasurer.—Certificate of County Auditor.—Duty of Auditor of State.—Duty of State Treasurer.*—Under the provisions of sections 6510 and 6511, R.S. 1881, whenever it appears to the board doing county business, in any county, that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the county auditor is required, under the order and direction of the county board, to certify, under his seal of office, such improper or

erroneous payments to the Auditor of State, whose duty it is to audit and allow the same as a claim against the State Treasurer, and he is required to pay such claim out of any moneys not otherwise appropriated.  
*Wolfe v. State, ex rel., 16*

2. *Same.—Judicial Duties.—Ministerial or Administrative Functions.*—In ascertaining that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the county board does not sit as a court nor discharge judicial duties, but merely performs the ministerial or administrative functions of such county board, under sections 5916 and 5917, R. S. 1881, in the inspection and examination of the office and books of such county treasurer. *Ib.*
3. *Same.—Ministerial Duty.—Judicial Power.—Mandate.*—Where the county auditor, under the direction of the county board, has certified to the Auditor of State that improper or erroneous payments have been made by the county treasurer to the State Treasurer, the Auditor of State has no judicial power, under the statute, over the claim so certified; but it is the plain ministerial duty of the State Auditor to audit and allow such payments as a claim against the State Treasurer, and if, upon reasonable request, the State Auditor refuse to issue his warrant for such payments so certified, he may be compelled by mandate to perform his duty. *Ib.*
4. *Same.—Certificate of County Auditor.—Defence.—Fraud or Mistake.*—Where the county auditor, under his seal of office and by the direction of the county board, certifies that improper or erroneous payments have been made by the county treasurer to the State Treasurer, such certificate is *prima facie* right and correct and binding upon the Auditor of State, and it can not be impeached or successfully defended against, except upon the grounds of fraud in its procurement or issue, or of mistake therein. *Ib.*
5. *Right of Appeal.—Railroad Aid.*—A petition by a taxpayer to the county board, praying that money collected by taxation in his township to aid a railroad by taking stock, be applied accordingly, was refused by the board.  
*Held*, that the petitioner had the right of appeal to the circuit court.  
*Board, etc., v. Karp, 236*
6. *Statement of Claim.—Itemized Account.—Pleading.*—Under section 5761, R. S. 1881, in force since May 6th, 1853, in presenting a claim to the board of commissioners for allowance, no formal complaint is necessary in the statement of such claim; but an itemized account, giving "a detailed statement of the items and dates of charge," is sufficient.  
*Board, etc., v. Ritter, 362*
7. *Same.—Township Trustee.—Overseer of the Poor.—Medical or Surgical Services to Paupers.—Contract by County Board with Physicians and Surgeons.—Defence.*—Under the statutes of this State, the paupers of each county must, in any event, receive necessary medical or surgical attention at the expense of the county. It is the duty of the county board to contract with physicians to attend upon the poor generally in the county; but the township trustee, as overseer of the poor, has the oversight and care of all poor persons in his township, so long as they remain a county charge, and must see that they are properly relieved and taken care of. Where a physician or surgeon is employed by a township trustee to attend upon a pauper in his township, if the county board had at the time of such employment and service a contract with some other physician or surgeon to attend upon the poor of such township, this is matter of defence, to be shown by the county board, to any claim presented for allowance by the physician or surgeon employed by such township trustee. *Ib.*
8. *Same.—Contract with Physician or Surgeon.—Judicial or Administrative*

*Duties.—Parol Evidence.*—In making a contract with a physician or surgeon for attendance upon the poor generally of the county, the county board does not act judicially, but in the discharge of an administrative duty; and while the minutes of the county board ought to show a memorandum at least of such contract, yet, if they fail to do so, the contract is not thereby invalidated, but may be established by parol evidence. *Ib.*

9. *Practice.—Certificate of Township Trustee.—Competent Evidence.—Error.*—Where the certificate of a township trustee is made a part of the claimant's demand, as presented to the county board, the admission of such certificate in evidence is not an error available for the reversal of the judgment. *Ib.*

#### COUNTY SUPERINTENDENT.

See TOWNSHIP TRUSTEE, 3.

#### COUNTY TREASURER.

See COUNTY COMMISSIONERS, 1 to 4.

#### COURTS.

See CONTEMPTS; OFFICE AND OFFICER, 5; TOWNS, 4.

#### CRIMINAL LAW.

See INTOXICATING LIQUOR; JUSTICE OF THE PEACE, 1 to 3; STATUTES, 2.

1. *Poor Person.—Power of Supreme Court.*—The Supreme Court has no authority to appoint or pay an attorney to prosecute an appeal for a defendant in a criminal case, and an attorney so appointed by the court below has full authority to prosecute the appeal. *Stout v. State, 1*
2. *Same.—Cause for New Trial.*—That the court admitted "irrelevant, incompetent and immaterial evidence," or rejected "competent, material and relevant evidence," will not be sufficiently specific as causes for a new trial, to present any question; so, also, that the court refused to permit the defendant to prove by A., B., C., and other competent witnesses, "the diseased condition of his mind at the time of and before the homicide." *Ib.*
3. *Same.—Competency of Juror.—Constitutional Law.*—Section 1793, R. S. 1881, is constitutional, and a juror having an opinion based only on rumor or newspaper statements, but who says upon oath that he can give an impartial verdict on the evidence, may, in the discretion of the trial court, be sworn as a juror, and in such case the Supreme Court will reverse only where it appears that this discretion has been abused. *Ib.*
4. *Same.—Practice.*—The jury may properly have the indictment when retired to consider of their verdict. *Ib.*
5. *Same.—Instructions.*—A statement by the court to the jury, that the venue of the cause has been changed from another county, is harmless to the defendant, as well as unobjectionable. *Ib.*
6. *Same.—Evidence.*—On a trial for murder, a general instruction concerning the law of homicide, some parts of which have no application to the evidence, will not be available error, unless in the particular case it seems probable that it might have confused or misled the jury, and this can not be supposed where the verdict is clearly right upon the evidence. *Ib.*
7. *Same.—Manslaughter.*—An instruction, that "Voluntary manslaughter is the unlawful killing of a human being, without malice, express or implied—voluntary, upon a sudden heat, as upon adequate provocation the passion has been aroused, and the fatal act is unlawfully and voluntarily committed before sufficient time has elapsed to allow the passion to cool and for reason to resume its sway," is not erroneous. *Ib.*

8. *Same.*—*Reasonable Doubt.*—*Jarrell v. State*, 58 Ind. 293, followed as to what is a reasonable doubt. *Ib.*
9. *Same.*—A careful and impartial admonition to the jury of the importance of the cause, in a trial for murder, as well to the rights of the defendant as to the interests of society, is not error. *Ib.*
10. *Same.*—*Verbal Inaccuracies.*—An instruction containing, by evident inadvertence or clerical error, a word which is merely inaccurate, as the use of "description" instead of "discretion," but which could not possibly mislead, is not available error. *Ib.*
11. *Keeping Devices for Gaming.*—*Indictment.*—An indictment for keeping a device for gaming, under section 2086, R. S. 1881, averring "that the defendant did, at the county and State aforesaid, unlawfully keep and exhibit a certain gaming apparatus, to wit, a faro bank, and then and there unlawfully kept the same for the purpose of wagering, winning and gaming thereon money and other articles of value," sufficiently charges the offence. It is not necessary in such case to describe the particular building or precise spot where the device was kept; properly naming the county and State is sufficient. *App v. State*, 73
12. *Same.*—*Change of Venue.*—*Jurisdiction.*—Jurisdiction vests in the court to which the change is taken in a criminal case, upon the deposit with its clerk of the original papers and a transcript of the proceedings of the court in which the indictment was found. *Ib.*
13. *Same.*—*Presumption.*—Where a defendant, who obtains a change of venue, appears in the court to which the case was sent, and goes to trial without objecting to the jurisdiction or suggesting any defects or irregularities, it will be presumed, in the absence of a contrary showing, that jurisdiction was properly obtained. *Ib.*
14. *Same.*—*Grand Jury.*—Where the record certified shows a due empanelling of the grand jury, it is sufficient without a specific statement of that fact in the clerk's certificate. *Ib.*
15. *Indictment.*—*Venue.*—*Keeping Gaming Apparatus.*—In an indictment for keeping gaming apparatus, in violation of section 2086, R. S. 1881, it is sufficient to aver that the offence was committed in the proper county and State, no more particular averment of place being necessary. *Keith v. State*, 89
16. *Same.*—*Change of Venue.*—*Clerk's Duty.*—*Transcript.*—Where a change of venue has been taken, it is unnecessary and impossible to show by the transcript sent to the county to which the change is taken, that the original indictment has been transmitted. It must be sent however. *Ib.*
17. *Malicious Trespass.*—*Statute Construed.*—The mere maliciously carrying away and conversion of the goods of another, without injury to the property itself by which its value is diminished, is not malicious trespass, as defined by section 1955, R. S. 1881. *State v. Cole*, 112
18. *Evidence.*—A denial by one accused of crime, of a fact which tends to show guilt, is itself a criminating circumstance, and proper evidence against him. *McDonel v. State*, 320
19. *Same.*—*Inspection of Weapons by Juror.*—It is entirely proper, as part of the *res geste*, to allow the jury to inspect a weapon by which an offence is alleged to have been committed. *Ib.*
20. *Change of Venue.*—*Original Papers.*—*Affidavit.*—On a change of venue in a criminal cause, the affidavit for such change of venue is not an "original paper," within the meaning of that expression as used in section 1771, R. S. 1881. *Bright v. State*, 343
21. *Same.*—*Motion in Arrest of Judgment.*—*Evidence.*—A motion in arrest of judgment in a criminal cause questions only the jurisdiction of the cause and the sufficiency of the indictment or affidavit and informa-

- tion; in no case does such motion call in question the sufficiency of the evidence to sustain the verdict. *Ib.*
22. *Indictment.—Perjury.—Witness.*—Perjury can not be assigned upon the testimony of a witness, before a grand jury, that certain named persons “did not *unlawfully* sell intoxicating liquors to him,” inasmuch as the opinion of the witness upon such a question of law is immaterial. *State v. Henderson, 406*
23. *Murder in Second Degree.—Instructions.*—A homicide, to constitute murder in the second degree, must be perpetrated purposely and maliciously; and an instruction to the jury to the effect that certain facts enumerated therein, if found, would be murder in that degree, *purpose* and *malice* not being included in the enumeration, is a fatal error. *Brooks v. State, 423*
24. *Affidavit and Information.*—In a prosecution by affidavit and information, the omission of the name of the affiant in the body or commencement of the affidavit is not a sufficient reason for quashing the information, when it appears that the affiant's name is signed at the close of the affidavit, and that he was sworn to the matters stated therein. *Beller v. State, 443*
25. *False Token or Writing.—Question of Fact.—Motion to Quash.*—The question as to whether the alleged false token or writing, copied in the indictment, is or is not of such a character that a person of ordinary caution would give it credit, is a question of fact and not of law, and is not presented by a motion to quash the indictment. *Wagoner v. State, 504*
26. *Same.—Sufficiency of Indictment.*—An indictment for obtaining goods by means of a false token or writing, which fails to allege that the token or writing was delivered by the defendant, and received by the prosecuting witness, in exchange or payment for the goods, is bad, and the motion to quash it ought to be sustained. *Ib.*

## DAMAGES.

See ASSAULT AND BATTERY; ATTORNEY AND CLIENT; CITY, 7; REPLEVIN, 2; WATERCOURSE.

## DECEDENTS' ESTATES.

- See CHATTEL MORTGAGE, 6; EXECUTION, 2; SUBROGATION; WITNESS, 1.
1. *Appointment of Administrator.*—The validity of the appointment of an administrator can not be questioned collaterally. *Ferguson v. State, ex rel., 38*
2. *Same.—Witness.—Competency of Party.*—In a suit against the administrator of the principal debtor and his sureties, the plaintiff might testify for himself, under the statute, Acts 1879, p. 245, if the administrator consented. The sureties could not object in such case. *Ib.*
3. *Mortgage of Real Estate by Heir.—Foreclosure.—Sale of Real Estate by Administrator.*—Where an heir executes a mortgage upon the real estate inherited by him, and the same is afterwards sold by the administrator of the ancestor for the payment of debts, the mortgagee is entitled to the excess of money arising therefrom, if any, and may, by foreclosure, before the settlement of such estate, obtain an order against the administrator, requiring him to pay such excess upon the mortgage. *Ball v. Green, 75*
4. *Same.—Set-Off by Administrator.—Lien.*—In such case, the administrator can not, as against the excess, set off any sum the mortgagor may owe him or such estate, as the mortgagee has a lien upon the money superior to any claim of the administrator. *Ib.*
5. *Personal Property.—Chose in Action.—Title of Administrator.—Replevin.*—When the administrator of a decedent is appointed and qualified, the

title and possessory rights of the decedent, in and to his personal property and choses in action, at once pass to and vest in his administrator, and he can maintain an action of replevin therefor.

*Smith v. Ferguson, 229*

6. *Same.—Gift Inter Vivos.—Delivery in Præsentia.*—To constitute a valid gift *inter vivos* of personal property or choses in action, it is essential that the gift be delivered *in præsentia* and unconditionally; because, if the gift be delivered to a third person, for future delivery to the donee, the authority to deliver may be revoked, and, until delivery, the donor retains dominion. *Ib.*
7. *Same.—Gift Causa Mortis.—Implied Condition.*—A gift *causa mortis* is a gift of a chattel or chose in action, made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void; and it is necessary to the validity of such a gift that there must be an actual delivery of the subject of the gift to the donee, such as will transfer its possession to him. *Ib.*
8. *Sale of Land by Administrator.—Widow's Right.*—A sale of the whole of a tract of land to make assets, by an administrator of a husband, in pursuance of an order of court, the same person being also administrator of the widow, who survived her husband, passes no title to the share which the widow took as such upon her husband's death. *Elliott v. Frakes, 339*
9. *Action by Heirs to Recover Claim.—Complaint.—Necessary Averments.*—In an action by the heirs at law of a deceased person to recover a claim due the estate of such person, it is necessary to allege in the complaint, in addition to the averments that there are no debts and that no administration has been granted upon such estate, that such decedent left no widow, or, if he did, that such widow has relinquished her interest in such estate; otherwise the complaint is insufficient upon demurrer, as it does not show that such heirs are entitled to the claim. *State, ex rel., v. Sanders, 421*
10. *Fraudulent Conveyance.—Creditor.*—A single creditor, as well as an administrator or an executor, may maintain an action to set aside a sale of lands fraudulently made by a deceased debtor. *Bottorff v. Covert, 508*
11. *Same.—Petition of Creditor for Sale of Land to Pay Debts.—Statute Construed.*—Section 2342, R. S. 1881, which authorizes a creditor to obtain an order requiring the administrator or the executor to file a petition for a sale of the decedent's lands, only authorizes such order for the sale of lands owned by him at the time of his death, and not such as may have been fraudulently conveyed. *Ib.*
12. *Same.—Creditor May Set Aside Land Fraudulently Conveyed.*—A single creditor may maintain the action, and after the sale is set aside the land becomes assets in the hands of the administrator or executor, who thereafter settles the estate in the usual way. *Ib.*
13. *Same.—Complaint.—Insolvency.*—Where the complaint in such case avers that the decedent, at the time of such conveyance, had no other property, and there are no assets in the hands of the administrator, the complaint is sufficient in this respect, as it is not necessary to aver that the decedent did not thereafter acquire property. *Ib.*
14. *Same.—Motion to Annul Order to Sell.—Practice.*—A motion to strike out an order requiring the administrator to sell the land and apply the proceeds upon the creditor's debt was too broad, as the direction to sell the land was right though the direction to apply the proceeds was wrong. *Ib.*

#### DECLARATIONS.

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## INDEX.

## DEED.

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## DEMURRER TO EVIDENCE.

*Practice.*—Where, upon a demurrer to evidence, there is evidence tending to sustain the party having the burden of the issue, the demurrer should be overruled, and, if no such evidence, sustained. *Kincaid v. Nicely*, 403

## DEPOSITION.

See SUPREME COURT, 10.

## DESCRIPTION.

See REAL ESTATE, ACTION TO RECOVER, 2; REPLEVIN, 3.

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See DRAINAGE.

## DIVORCE.

*Alimony.—Support of Children.—Evidence.*—When a divorce is granted, the court has full authority to provide for the support of children, and, in determining the amount of such provision and of alimony, should consider not only the amount of the husband's present estate, but also his ability to make future earnings; and, in ascertaining his present estate, evidence of its extent shortly before the trial is proper.

*Logan v. Logan*, 107

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1. *Ditch Assessment.—Jurisdiction.—Collateral Attack.*—When a petition for the location of a ditch is sufficient to give the county board jurisdiction of the subject-matter, an assessment thereunder can not be collaterally attacked for mere irregularities, the remedy therefore being by an appeal from the order of the board. *Foster v. Paxton, 122*
2. *Constitutional Law.—Repair of Ditches.—Township Trustee.*—So much of section 4282, R. S. 1881, as requires the township trustee to keep public drains in repair, and to pay the expense thereof out of the funds of the township, is constitutional and valid. *Ingerman v. Noblesville Tp., 393*

**EJECTMENT.**

See REAL ESTATE, ACTION TO RECOVER.

**EMPLOYER AND EMPLOYEE.**

See NEGLIGENCE, 11.

**EQUITY.**

See JUDGMENT, 5 to 7; MISTAKE, 2; MORTGAGE, 3, 5; PRINCIPAL AND SURETY, 4.

**ENDORSER AND ENDORSEE.**

See MORTGAGE, 3, 8.

**ESTATE BY ENTIRETIES.**

See FRAUDULENT CONVEYANCE, 3; HUSBAND AND WIFE, 2, 3.

**ESTOPPEL.**

See PARTNERSHIP, 2; PROMISSORY NOTE, 3; REAL ESTATE, ACTION TO RECOVER, 7; SUMMONS; TOWNSHIP TRUSTEE, 2; WILL, 3.

1. *Plea of.—Sufficiency of Answer.—Demurrer.—Error.*—It is error to overrule a demurrer to an answer of estoppel, which fails to show that the plaintiff had knowledge of the facts constituting the estoppel, and which does show that the defendant had knowledge, or the means of knowledge, of all such facts. *Buck v. Milford, 291*
2. *Plea of.—Location of Gravel Road.—Injunction.*—A plea of estoppel must clearly and fully set forth all the facts essential to the existence of an estoppel, leaving nothing to intendment; and an answer of estoppel to an action to enjoin the location of a gravel road on a line different from that ordered by the board of county commissioners must show, with sufficient certainty, the acts constituting such estoppel. *Stewart v. Beck, 458*

**ESTRAYS.**

See REPLEVIN, 5.

**EVIDENCE.**

See ASSAULT AND BATTERY, 3; BILL OF EXCEPTIONS, 2, 6; BOND, 3; BOUNDARIES, 1; COMMON CARRIER; COUNTY COMMISSIONERS, 8, 9; CRIMINAL LAW, 6, 18, 21; DEMURRER TO EVIDENCE; DIVORCE; INSTRUCTIONS TO JURY, 5 to 8; JUDGE, 2; JURY; MALICIOUS PROSECUTION; MARRIED WOMAN, 3; MISTAKE, 5; MORTGAGE, 7, 10; NEGLIGENCE, 11; NEW TRIAL, 1, 3; PARTITION, 4; PARTNERSHIP, 1; PLEADING, 2, 3; PRACTICE, 2, 5, 8; PRINCIPAL AND SURETY, 1; QUIETING TITLE; RAILROAD, 5; REAL ESTATE, ACTION TO RECOVER, 3, 4, 6; RECEIPT; REPLEVIN, 4; SPECIAL FINDING; SUPREME COURT, 1 to 3, 5, 8, 11, 12; TOWNS, 4; WILL, 8, 10; WITNESS, 4.

1. *Admissions.—Admissibility.*—Evidence which legitimately tends to prove an admission by the defendant of a single fact which helps to make the plaintiff's case, may be admitted without error. *Nave v. Flack, 205*

2. *Same.—Order of Proof.—Discretion.*—The admission of evidence in rebuttal, which is only proper in chief, is not available error. *Ib.*
3. *Same.—Practice.—Supreme Court.*—Unless specific objection to evidence be stated when the objection is made, no question in the Supreme Court can be made upon a ruling admitting it. *Ib.*
4. *Value of Wife's Inchoate Interest in Husband's Land.*—Where the value of a wife's inchoate interest in her husband's lands is in question, evidence showing the age, health and habits of both is proper.  
*Sedgwick v. Tucker, 271*
5. *Same.—Intention.—Conveyance.*—Where it is in question whether an act was done to defraud creditors, it is competent to prove directly by the actor what his actual intention was. *Ib.*
6. *Same.—Agreement.—Husband and Wife.—Competency of Witness.*—An agreement between husband and wife might, under the act of 1867, be proved by the wife, the same not being a confidential communication. *Ib.*

## EXCEPTIONS.

See AGREED CASE, 2; BILL OF EXCEPTIONS; HABEAS CORPUS, 2; SUPREME COURT, 1, 3.

## EXECUTION.

See CHATTEL MORTGAGE, 6; FRAUDULENT CONVEYANCE, 1; HUSBAND AND WIFE, 3; PRINCIPAL AND SURETY, 4.

1. *Proceedings Supplementary to.—Pleading.*—In proceedings supplementary to execution, if the affidavit fail to show some necessity for the application, it is insufficient. *Dillman v. Dillman, 585*
2. *Same.—Appeal.—Transcript, When Filed.—Decedents' Estates.—Statute Construed.*—Section 2455, R. S. 1881, requiring the transcript, on appeal, to be filed in the Supreme Court within ten days after filing the appeal bond, does not apply to appeals in proceedings supplementary to execution, where an executor is required to answer under section 819. *Ib.*

## EXECUTOR.

See EXECUTION, 2.

## EXHIBITS.

See PLEADING, 3; TOWNS, 3.

## EXTENSION OF TIME.

See MORTGAGE, 1.

## FALSE PRETENSES.

See CRIMINAL LAW, 25, 26; STATUTES, 2.

## FEES.

See SCHOOL REVENUE, 1.

## FENCE.

See RAILROAD, 1, 2; REAL ESTATE, ACTION TO RECOVER, 3, 5.

## FINDING.

See CHATTEL MORTGAGE, 6; HABEAS CORPUS, 4; JUDGMENT, 4; NEW TRIAL, 3; SPECIAL FINDING.

## FORBEARANCE TO SUE.

See MORTGAGE, 10.

## FORECLOSURE.

See CHATTEL MORTGAGE, 3; DECEDENTS' ESTATES, 3, 4; MORTGAGE; RAILROAD, 3; REAL ESTATE, ACTION TO RECOVER, 7.

FORFEITURE.

See RAILROAD, 4.

FORMER ADJUDICATION.

See JUDGMENT, 4; MORTGAGE, 6, 7; REPLEVIN BAIL, 2, 3; SUBROGATION.

FRAUD.

See BANKRUPTCY; CHATTEL MORTGAGE, 4 to 6; COUNTY COMMISSIONERS, 4; EVIDENCE, 5; JUDGMENT, 5 to 8; MISTAKE, 1, 3.

FRAUDULENT CONVEYANCE.

See DECEDENTS' ESTATES, 10 to 14; INJUNCTION, 3; REPLEVIN BAIL, 2, 3.

1. *Insolvency.—Complaint.*—An averment, that the defendant in an execution had not, when the execution was issued, as much personal property as is by law exempt from execution, and that in 1880 he conveyed the real estate in question to his wife, thereby leaving no property in his hands subject to execution, sufficiently shows the debtor's insolvency to justify a levy on property fraudulently conveyed.  
*Ream v. Karnes, 167*
2. *Same.—Consideration.—Husband and Wife.—Resulting Trust.*—In 1846, money of the wife belonged by law to the husband, and a purchase by him of lands therewith, in his own name, created no resulting trust in her favor, and a conveyance of such lands to her, without any other consideration, would be fraudulent as against his creditors. *Id.*
3. *Consideration.—Husband and Wife.*—Heirs of an intestate made partition by deed of the lands inherited, one of them at the time indebted beyond his ability to pay, taking a conveyance to himself and wife, as tenants of the entirety. The wife had before that joined in conveyances of her husband's very valuable lands only upon the promise by her husband to pay her the value of her inchoate interest in such lands, and these promises were the consideration moving from her for the conveyance of the lands in question to herself and husband, and there was no actual intent to defraud her husband's creditors.

*Held*, that the conveyance was valid as against the husband's creditors.

*Sedgwick v. Tucker, 271*

GAMING.

See CRIMINAL LAW, 11, 15.

GIFT CAUSA MORTIS.

See DECEDENTS' ESTATES, 7.

GIFT INTER VIVOS.

See DECEDENTS' ESTATES, 6.

GRAND JURY.

See CRIMINAL LAW, 14.

GRAVEL ROAD.

See ESTOPPEL, 2.

*Corporation.—Subscription to Capital Stock.—Sufficiency of Complaint.*—In a suit by a gravel road corporation against a subscriber to its capital stock, upon his stock subscription, wherein he has agreed to pay a certain sum per share for a certain number of shares of its capital stock, at such times and in such manner as required by its directors, it is not necessary to the sufficiency of the complaint that it should allege the completion of its line of gravel road as described in its articles of association, or that it has constructed or will construct a gravel road upon the line or route described in its articles of association.

*Darrell v. Hilligoss, etc., G. R. Co., 264*

## GUARDIAN AND WARD.

See INSANITY.

*Conversion.—Interest.*—A ward who has attained his majority may either sue his guardian individually or upon his bond for a conversion of the ward's money received during the guardianship, and the highest rate of legal interest which the guardian could reasonably have obtained for the use of the money may be allowed. *Hays v. Walker, 105*

## HABEAS CORPUS.

1. *Sufficiency of Petition.—Civil Action.—Assignment of Error.*—An application for a writ of *habeas corpus* is not a civil action, and, therefore, an assignment of error, that the petition for the writ does not state facts sufficient to constitute a cause of action, does not call in question the sufficiency of such petition. *McGlennan v. Margowski, 150*
2. *Same.—Motion to Quash.—Answer or Return.—Exception.—Demurrer.*—The sufficiency of the petition is questioned, not by a demurrer for the want of facts, but by a motion to quash the writ; nor can the sufficiency of the answer or return to the writ be questioned by a demurrer, but only by an exception. *Ib.*
3. *Same.—Parent and Child.*—Where, however, the petition of a father shows that he is deprived of the custody of the person of his legitimate child, of the tender age of eleven years, by the acts of the defendant, in whatever form the question is presented, the petition is sufficient. *Ib.*
4. *Same.—Practice.—Summary Proceeding.—Hearing.*—Under section 1118, R. S. 1881, a proceeding by *habeas corpus* is to be heard and determined in a summary way, and neither the court nor judge can be required, as in a civil action, to make a special finding of the facts or state conclusions of law thereon. *Ib.*
5. *Same.—Father and Child.—Custody of Infant.*—The general rule is that the father of a legitimate infant child is entitled to the possession and control of the child's person, as against any other claimant, and under section 2518, R. S. 1881, this is the statutory rule in this State. *Ib.*
6. *Same.—Judgment for Costs.—Error.—Supreme Court.*—There is no error in adjudging costs against the unsuccessful party in a *habeas corpus* proceeding, and certainly none, where the judgment for costs is complained of for the first time in the Supreme Court. *Ib.*

## • HARMLESS ERROR.

See ASSAULT AND BATTERY, 3; INJUNCTION, 5; INSTRUCTIONS TO JURY, 1, 2; JUDGMENT, 10; PARTITION, 4; PLEADING, 2, 4; PRACTICE, 5, 6, 8; SUPREME COURT, 4.

## HEIR.

See DECEDENTS' ESTATES, 3, 4, 9; SUBROGATION; TRUST AND TRUSTEE, 3.

## HIGHWAY.

See ESTOPPEL, 2; GRAVEL ROAD; WITNESS, 4.

1. *Location of.—Remonstrants.—Separate Appeals.—Bond.—Surety.*—Where a proposed highway affects the respective lands of several persons, and each of them files before the board of commissioners his separate remonstrance on the ground that such road will not be of public utility, and that he will sustain damages by its location, each may appeal from the order made against him by filing bond, with his co-remonstrator as his surety. *Leffel v. Obenchain, 50*
2. *Same.—Dismissal.—Sufficient Bond.*—After the consolidation of such cases in the circuit court, such appeal will not be dismissed because none of the bonds filed are signed by any person other than one of the other remonstrators for damages. *Ib.*

3. *Drainage of Highways.—Township Trustee.—Superintendent of Roads.—Statute Construed.*—Sections 5064 to 5090, R. S. 1881, so far modify the provisions of section 4281, R. S. 1881, that the proceedings authorized by the latter section, for the drainage of highways, can only be instituted and prosecuted by the superintendent of roads, and not by the township trustee. *Jones v. Dunn, 78*
4. *Report of Viewers.—Public Utility.—Presumption.*—It is not necessary to the validity of the order of the board of county commissioners locating or changing a highway in a proceeding for such purpose, that the viewers should report the proposed road of public utility, or that the board should expressly so find. If the report be favorable, and silent as to the public utility of the location or change, or if they do not report that the location or change is not of public utility, it should be presumed that they deemed it of public utility. *Heagy v. Black, 534*
5. *Same.*—The report of viewers appointed to locate or change a highway will be presumed to have been made in conformity with the statute, where nothing to the contrary appears. *Ib.*
6. *Same.—Notice.—Collateral Attack.—Jurisdiction.*—That the notice of the presentation of a petition for the location or change of a highway was given, is a jurisdictional fact to be determined by the county board, and where it has found that notice was given, and proceeded to act by the appointment of viewers, its decision is conclusive of such notice as against collateral attack. *Ib.*
7. *Same.—Injunction.—Complaint.*—For complaint and allegations held insufficient to restrain by injunction the location of a highway under an order of a county board, see opinion. *Ib.*

#### HUSBAND AND WIFE.

- See EVIDENCE, 4, 6; FRAUDULENT CONVEYANCE, 2, 3; JUDGMENT, 3; LANDLORD AND TENANT; MARRIED WOMAN; PARTITION, 5, 6; WITNESS, 2.
1. *Real Estate.—Contract.—Jointure.—Antenuptial Agreement.—Rescission by Parol After Marriage.*—An antenuptial agreement in writing, duly acknowledged, whereby fair provision is made for the wife in case of widowhood, in consideration of which she agrees to forego all interest in his estate which would otherwise accrue by virtue of the marriage, such provision embracing, amongst other things, an estate for her own life in a tract of land described, to take effect upon his death, creates a jointure within the meaning of section 2500, R. S. 1881, and vested in her an estate in lands which can not be divested by parol, and a mutual agreement of the parties, by parol, after marriage, that the contract should not be enforced, can not annul it. R. S. 1881, section 2919. *Craig v. Craig, 215*
  2. *Estates by Entireties.—Conveyance.—Repeal of Statute.*—Tenancy by entirety was not abolished, nor the statute recognizing it, R. S. 1881, section 2923, repealed by the act of 1881, enlarging the rights of married women. R. S. 1881, section 5115, *et seq.* *Carver v. Smith, 222*
  3. *Same.—Execution.*—Lands conveyed to husband and wife are not subject to the levy of an execution against either while both are living. *Ib.*

#### INDICTMENT.

See CRIMINAL LAW, 11, 15, 22, 25, 26.

#### INFANT.

See HABEAS CORPUS, 5; JUDGMENT, 1; MARRIED WOMAN, 1, 2.

#### INJUNCTION.

See ESTOPPEL, 2; HIGHWAY, 7; JUDGMENT, 4; REPLEVIN BAIL, 3.

1. *Supplemental Complaint.—Practice.*—Where a party, after filing his complaint, files a supplemental complaint seeking to obtain an injunction, and the court issues an order without notice, and upon motion refuses to dissolve the injunction, and an appeal is taken from such order, it will be considered as an injunction and not a mere temporary restraining order. *Morey v. Ball, 450*
2. *Same.—Demurrer.*—Where the defendant appears without notice and files a demurrer to such supplemental complaint, the court does not err in issuing an injunction without first passing upon the demurrer, as a demurrer to such pleading is unknown to the practice. *Id.*
3. *Same.—Fraudulent Conveyance.—Judgment.*—A creditor under our statute may enjoin his debtor from transferring his property fraudulently, without first obtaining a judgment. *Id.*
4. *Same.—Partnership.—Averment in Complaint.*—Where two persons constitute one firm, and are members of another, and an action is brought to restrain them from fraudulently disposing of the property of the latter firm, it is error to enjoin them from disposing of the property of the former firm, or of their individual property, without any averment that they are threatening to do so, and when such order is made it is error to refuse, upon motion, to modify it as to the property of such last named firm, or their individual property. *Id.*
5. *Harmless Error.—Practice.*—The refusal to dissolve a temporary restraining order is not available error upon an appeal from a judgment for a perpetual injunction; to present any question upon such ruling the grounds of the motion must be shown by bill of exceptions. *Heagy v. Black, 534*
6. *Same.—Joinder of Parties.—Location of Highway.—Trespass.*—Where a supervisor, claiming to act under an order of the board of county commissioners locating a highway, attempts its location on a line deviating from that named in the order, he is guilty of a trespass, and each land-owner over whose lands he is threatening to open the road, if he has no adequate remedy at law, may maintain an action to enjoin such trespasser, but such land-owners, having separate and distinct causes of action for such trespasses, can not join as plaintiffs in such an action; but where the proceedings of the board are void, and irreparable damage would be done to the property of each of a number of persons by the acts of the supervisor in opening the road on the line designated by such proceedings, a joinder is permitted to avoid a multiplicity of suits. *Id.*

## INSANITY.

*Inquest of.—Guardianship.—Jurisdiction.—Notice.*—Where, in proceedings to ascertain one's insanity, with a view to guardianship, under sections 2545-2547, the subject is produced in court and is present during the trial, the proceedings being in all respects according to the statute, the court has jurisdiction, no other notice to him being necessary.

*Nyce v. Hamilton, 417*

## INSOLVENCY.

See DECEDENTS' ESTATES, 13; FRAUDULENT CONVEYANCE, 1.

## INSTRUCTIONS TO JURY.

See ASSAULT AND BATTERY, 3; CRIMINAL LAW, 5 to 10, 23; NEGLIGENCE, 17; REPLEVIN, 4; SUPREME COURT, 7, 8, 9; WILL, 6, 7, 8.

1. *Harmless Error.*—An instruction, which is erroneous because it is without the issues and too favorable to the appellant, is harmless as to him. *Mooney v. Kinsey, 33*
2. *Errors Cured.*—An instruction, incorrect by reason of the omission to state a proper qualification of a rule of law, is not available error, if the omission be supplied by other instructions. *Brown v. Anderson, 93*

3. *Error not Available.—Defects Cured.*—Where it appears affirmatively that the verdict was right on the merits, an erroneous instruction will not reverse the judgment. R. S. 1881, section 658. *Norris v. Casel, 143*
4. If instructions taken together are without conflict, and properly and fully express the law, a single one, incomplete standing alone, is not, on that ground, liable to objection. *Wallace v. Ransdell, 173*
5. Where upon the evidence there is really but one question fairly debatable, it is not error to instruct the jury that that is the controlling question. *Sedgwick v. Tucker, 271*
6. *Same.—Fraud.*—That "fraud is never presumed," if said by the court to the jury under such circumstances that it would be understood merely that fraud can not be found without some evidence of its existence, is not available error. *Ib.*
7. *Evidence.—Question for Jury.—Error.*—Where, on the trial of a civil action, the plaintiff introduces evidence tending to sustain the material allegations of his complaint, it is error for the court to invade the province of the jury and instruct them to return a verdict for the defendant. *Adams v. Kennedy, 318*
8. *Evidence.—Presumption.*—An instruction, correct as a general statement of the law, will, in the absence of the evidence, be presumed to have been applicable to the evidence adduced. If a defendant desires a more specific instruction he must ask it. *Beller v. State, 448*
9. *Construction.*—Instructions are to be taken as an entirety, and are not to be judged by detached sentences. *Wright v. Fanster, 492*

INTENTION.

See EVIDENCE, 5.

INTEREST.

See GUARDIAN AND WARD; MORTGAGE, 10; PARTITION, 3.

INTERROGATORIES TO JURY.

See NEGLIGENCE, 15.

*Answers to.—Verdict.*—Answers by a jury to interrogatories are to be considered as an entirety, and judgment should be rendered on the general verdict, unless such answers are irreconcilable therewith.

*Strecker v. Conn, 469*

INTOXICATING LIQUOR.

See TOWNS, 2, 3.

*Cities.—Crimes.—Criminal Law.—Statute Construed.*—Selling liquor without a city license is not a public offence by statute, and section 1640, R. S. 1881, does not forbid punishment therefor under an ordinance of the city.

*Zeller v. Crawfordville, 262*

JOINTURE.

See HUSBAND AND WIFE, 1.

JUDGE.

1. *Jurisdiction.—Judge pro tem.*—Where a cause was tried by a judge *pro tem.* without objection below, none can be made in the Supreme Court. *Board, etc., v. Seaton, 158*
2. *Mandamus.—Bill of Exceptions.—Motion to Compel Judge to Sign.—Master Commissioner.—Practice.*—A cause was referred to a master commissioner with direction to report the evidence, which he did not do, but reported his finding of the facts. The petitioner, who now seeks a mandate to compel the judge below to sign a bill of exceptions containing the evidence, made no objection to the report, but upon his motion the judge stated conclusions of law upon the facts so reported,

and rendered judgment accordingly. On the first day of the next term, the finding of the master was first questioned by a motion for a new trial, which was overruled at a subsequent term, and the bill of exceptions tendered.

*Held*, that, by his motion for conclusions of law upon the facts stated in the report, the petitioner affirmed the correctness of the facts as found, and was not afterwards at liberty to question them, and so the judge could not be required to sign the bill. *Borchus v. Saylor*, 439

## JUDGMENT.

See BILL OF EXCEPTIONS, 6; CRIMINAL LAW, 21; HABEAS CORPUS, 6; INJUNCTION, 3; JUSTICE OF THE PEACE, 1 to 3; MALICIOUS PROSECUTION; MISTAKE, 3; MORTGAGE, 6, 7; PAYMENT, 2, 3; REAL ESTATE, ACTION TO RECOVER, 1; REPLEVIN, 1 to 3; REPLEVIN BAIL; SUBROGATION; SUPREME COURT, 6, 13, 14.

1. *Jurisdiction.—Service of Process.—Practice.—Guardian ad Litem.*—Where infant defendants are not served with process and do not appear, the court has no authority to appoint a guardian *ad litem* for them, and no jurisdiction as to them, and on appeal, when the judgment against them affects also the other appellants, it will be reversed as to all.

*Roy v. Rowe*, 54

2. *Payment.*—Payment by one primarily liable as a judgment debtor extinguishes the judgment.

*Klippel v. Shields*, 81

3. *Same.—Sheriff's Sale.—Assignment of Certificate.—Joint Judgment Debtor.*—The land of one of two joint judgment debtors, both principals, was bid in by the plaintiff, whereupon the other debtor paid the debt and took an assignment of the sheriff's certificate, and afterwards caused a sheriff's deed to be executed to his wife.

*Held*, that the wife took no title, the payment made having extinguished the judgment. *Ib.*

4. *Injunction.—Appeal from Dismissal after Finding for Defendant.—Judgment Pending Appeal.—Former Adjudication.—Negligence.*—A. brought an action against B. upon a promissory note, and the court, after trying the cause and making its finding in favor of B., permitted A. to dismiss the action. Thereupon B. appealed from such judgment of dismissal to the Supreme Court. The cause was reversed, and judgment was thereafter rendered by the circuit court upon its finding in favor of B. Pending such appeal, and before such reversal, A. brought another action against B., upon the same note, recovered judgment, and, after the reversal and rendition of the judgment in favor of B., sued out an execution upon the judgment so recovered by him, whereupon B. brought an action to enjoin the collection of such judgment.

*Held*, that the finding in favor of B. entitled him to a judgment which, when rendered, conclusively established a complete defence to an action upon the note, and as B. had no opportunity to avail himself of such defence during the pendency of the second action, the judgment not then having been rendered, the court will perpetually enjoin the collection of such judgment.

*Held*, also, that a failure to ask for a stay of proceedings on the second action until the appeal was determined in the first, was not such negligence as bars injunctive relief. *Walker v. Heller*, 198

5. *Procurement of by Fraud.—Equitable Defence.*—Fraud in obtaining a judgment is an equitable defence to such judgment, under the code.

*Hogg v. Link*, 346

6. *Same.—How Attacked for Fraud.*—Fraud in the procurement of a judgment constitutes ground for a direct attack upon the judgment by a party thereto, by an application corresponding to an original bill in equity. *Ib.*

7. *Same.—When Vendee May Not Attack Judgment Procured by Fraud Against Vendor.*—Where a purchaser of real estate takes a conveyance with covenants of warranty, with legal notice of a judgment lien upon the land, though he pay full value, he must rely upon his grantor's covenants and the equities arising out of the relation thus voluntarily assumed, without the right to impeach the judgment for fraud practiced against the judgment defendant alone in the procurement of the judgment. *Ib.*
8. *Same.—Case Stated.*—H., by a fraud practiced upon R., obtained a judgment against the latter, which became a lien upon the real estate of R., which R. afterwards sold and conveyed to L. by deed, with full covenants. Subsequently, H. became the purchaser of the land under execution issued upon his fraudulent judgment, and took a marshal's deed upon his purchase.  
*Held*, that though R. could have protected his title by attacking the judgment collaterally for the fraud, yet L., his grantee, could not. *Ib.*
9. *Assignment of.—Principal and Agent.—Ratification.*—If the owner of a judgment (holding either by legal or equitable title) receives, and with a knowledge of the facts retains, the price paid for an unauthorized assignment of the judgment, made in the name of the owner by one who assumed to have authority thereto, the assignment is thereby ratified. *Wallace v. Lawyer, 499*
10. *Mistake.—Correction.—Practice.*—Mistakes in judgments may be corrected by motion, and do not require either a complaint or a summons, and a complaint may be regarded as a motion and a summons as a notice; and where the controversy is heard and determined upon the evidence, the pleadings and rulings thereon are harmless. *Gray v. Robinson, 527*
11. *Same.—Principal and Surety.*—Where a judgment is taken upon a promissory note against the principal and sureties, by mistake in computing the amount, for less than is due, and enough property of the principal levied upon to satisfy the debt, and the sureties, to save it from sacrifice, have paid the judgment, without any knowledge of the mistake made, settlement had with the principal on the basis of the judgment, taking the obligation of a third person to indemnify themselves for the sum so paid, the property having been disposed of and the principal insolvent, such judgment will not be corrected as against the sureties. *Ib.*

#### JUDICIAL COGNIZANCE.

See OFFICER AND OFFICER, 5; TOWNS, 4.

#### JUDICIAL OFFICE.

See OFFICE AND OFFICER.

#### JUDICIAL SALE.

See MARRIED WOMAN, 6.

#### JURISDICTION.

See APPEARANCE; CRIMINAL LAW, 12, 13, 21; DRAINAGE, 1; HIGHWAY, 6; INSANITY; JUDGE, 1; JUDGMENT, 1; MISTAKE, 3; RAILROAD, 5; REAL ESTATE, ACTION TO RECOVER, 1; SURETY OF PEACE; TOWNS, 1.

#### JUROR.

See CONTEMPTS, 2; CRIMINAL LAW, 3, 19.

*Competency of.—Alien.—Statute Construed.*—The statute, R. S. 1881, section 1793, which makes alienage a cause of challenge of a juror, requires only that he be a citizen of this State, and not that he shall be a citizen of the United States. *McDonel v. State, 320*

## JURY.

See CRIMINAL LAW, 4, 14, 19; INSTRUCTIONS TO JURY, 7; PARTNERSHIP, 4; REPLEVIN, 4.

1. *Evidence.—Admissions.*—Where there is no impeaching or contradictory evidence, and the admissions testified to are corroborated by the other testimony in the case, the jury have no right to arbitrarily disregard them. *State, ex rel., v. Wilson, 114*
2. *Same.—Amount of Recovery.*—Where a *prima facie* case, entitling plaintiff to recover a much larger sum than that allowed, is shown, and no contradictory evidence is offered, the jury should base the amount of recovery upon the case thus made. *Ib.*

## JUSTICE OF THE PEACE.

See MISTAKE, 3; SUMMONS; TOWNS, 1.

1. *Entry of Judgment in Criminal Cases.*—Where there is no statute prohibiting, a justice of the peace may enter judgment in favor of the defendant, in a criminal prosecution, at any time after it is rendered. *Wright v. Fansler, 492*
2. *Same.—Rights of Defendant.*—A defendant, acquitted of a criminal charge, can not be deprived of his rights by the failure of the justice of the peace to enter of record the judgment of acquittal at the time it was rendered. *Ib.*
3. *Same.—Statute on Subject of Entering Judgments.*—The statute on the subject of entering judgments by justices of the peace applies only to civil proceedings. *Ib.*
4. *Complaint.*—A complaint before a justice of the peace, alleging that the defendants "are indebted to the plaintiff for money had and received at their special instance and request, in the sum of \$100, which is due and unpaid," is sufficient. *Koons v. Williamson, 599*
5. *Same.—Misjoinder of Causes.—Dismissal.*—Misjoinder of causes of action before a justice of the peace does not warrant a dismissal of the suit. *Ib.*

## LANDLORD AND TENANT.

*Use and Occupation.—Agreement.—Husband and Wife.*—A widow and widower, each owning a farm and having children, married, and thereafter the two families were merged, the husband supporting both, cultivating and improving and paying taxes on both farms, and the unconsumed profits going into his personal estate. There was no agreement to pay rent to the wife.

*Held*, that the relation of landlord and tenant did not exist, and that upon the death of the husband the wife could not recover from his estate for his use and occupation of her lands. *Davis v. Watts, 372*

## LICENSE.

See RAILROAD, 3; TOWNS, 2, 3.

## LIEN.

See DECEDENTS' ESTATES, 4; JUDGMENT, 7, 8; MORTGAGE.

## MALICIOUS PROSECUTION.

*Effect of Acquittal.—Evidence.*—A judgment of acquittal is *prima facie* evidence of innocence. *Wright v. Fansler, 492*

## MALICIOUS TRESPASS.

See CRIMINAL LAW, 17.

## MALPRACTICE.

See NEGLIGENCE, 2.

MANDAMUS.

See COUNTY COMMISSIONERS, 3; JUDGE, 2; TOWNSHIP TRUSTEE, 1, 3.

MANSLAUGHTER.

See CRIMINAL LAW, 7.

MARRIAGE CONTRACT.

See HUSBAND AND WIFE, 1; PARTITION, 5, 6.

MARRIED WOMAN.

See EVIDENCE, 4, 6; FRAUDULENT CONVEYANCE, 2, 3; HUSBAND AND WIFE; LANDLORD AND TENANT; PARTITION, 5, 6; TAXES; WITNESS, 2.

1. *Conveyance.—Infant Married Woman.—Interest in Husband's Real Estate.*—By the provisions of sections 2939, 2940 and 2941, R. S. 1881, a married woman less than twenty-one and more than eighteen years of age has been authorized to execute a valid conveyance of her interest in her husband's lands in this State, by uniting with him in a deed, with the consent of her father—if no father, with the consent of the mother, and if neither father nor mother, with the consent of the circuit judge, to be manifested in accordance with the formalities of the statute.

*Fisher v. Payne, 183*

2. *Same.—Disaffirmance.—Action to Recover Real Estate.—Complaint.*—A complaint by such woman to recover her interest in the lands of her husband, conveyed by them in 1863, on the ground that after her husband's death, and after she attained full age, she disaffirmed such conveyance, is insufficient on demurrer, when it is not averred that such conveyance was made without the consent of father, mother or circuit judge. *Ib.*

3. *Trustee.—Conveyance.—Parol Trust.—Evidence.—Wife's Separate Deed.*—Where a husband and his wife convey his real estate to their son, who conveys the same to the wife in pursuance of a parol agreement that the wife will hold such land in trust for the husband, and the wife thereafter, in execution of such trust, by her separate deed, conveys such land to the son who conveys the same to the husband, proof of such facts is admissible for the purpose of showing that the wife held said land in trust for her husband, and her separate deed, in execution of such trust, is sufficient to convey such land. *Moore v. Cottingham, 239*

4. *Same.—Husband and Wife.*—A parol trust concerning lands can not be enforced, nor is the separate deed of a married woman sufficient to convey lands of which she is the beneficial owner. *Ib.*

5. *Same.*—A parol trust may be shown, not for the purpose of enforcing it, but for the purpose of showing that it has been fully executed, and when a married woman holds lands in trust she may execute the same by her separate deed. *Ib.*

6. *Deed.—Wife.—Inchoate Interest.—Judicial Sale.—Partition.*—A husband's lands were sold on execution to satisfy a personal judgment against him, and, not being redeemed, the purchaser took a sheriff's deed. During the year for redemption the husband and wife joined in a conveyance, with covenants, of the lands to H.

*Held*, that H. was seized of an undivided one-third of the land, which would have vested in the wife by virtue of the statute, R. S. 1881, section 2508, and could maintain suit for partition. *Youst v. Hayes, 413*

MASTER AND SERVANT.

See NEGLIGENCE, 11, 13.

MASTER COMMISSIONER.

See JUDGE, 2.

## MEMBER OF FAMILY.

See LANDLORD AND TENANT.

## MENTAL CAPACITY.

See WILL, 8 to 10.

## MISJOINDER.

See INJUNCTION, 6; JUSTICE OF THE PEACE, 5.

## MISTAKE.

See COUNTY COMMISSIONERS, 4; JUDGMENT, 10, 11.

1. *Voluntary Payment.—Legal Compulsion.—Without Fraud.*—Money voluntarily paid under no mistake of fact, without fraud or imposition upon the party paying it, can not be recovered, although it was not legally due, and it makes no difference that the money was paid under compulsion of legal process. It may still be lawfully retained by the party receiving it, if there was no fraud on his part and no undue advantage taken by him of the situation of the other party.  
*Hollingsworth v. Stone, 244*
2. *Same.—Mistake of Law.—Equity.*—A mistake of law is no ground of relief even in equity, yet it may be connected with such circumstances as will entitle a party to relief. *Id.*
3. *Same.—Fraud.—Void Judgment.—Justice of the Peace.—Arbitration.—Jurisdiction.—Recovery of Money Extorted.—Pleading.*—In a suit before a justice of the peace, the defendant pleaded a set-off, orally stating that he did not wish for any excess of the set-off over the plaintiff's demand. There was then a reference of the dispute to arbitrators, but no award was made, and the justice afterwards rendered a judgment in favor of the defendant for \$130, and eight months thereafter an execution was issued thereon, which was the first knowledge the plaintiff had of the judgment. At that time the plaintiff was sick, in distress, because of the recent death of several children, and ignorant of her rights, and it was then represented to her by the defendant and the justice that she had no remedy, who threatened to levy upon and sell all her property. She believed them and in consequence paid the judgment.  
*Held*, upon these facts, that she could maintain a suit to recover the money paid.  
*Held*, also, that the judgment was void, because the justice had no jurisdiction to render it, and that it was not necessary to a recovery to aver or prove that the plaintiff did not owe the debt for which the judgment was rendered. *Id.*
4. *Relief From.*—A party will not be relieved from his own mistake or carelessness, where rights have been lost or money parted with on the faith of the apparent facts. *Gray v. Robinson, 527*
5. *Record.—Nunc Pro Tunc Entry.—Correcting Misprision.—Practice.*—After a cause has ceased to be *in fieri*, and after the term, the record thereof can only be corrected, if there be some written memorial or minute by which the actual proceedings can be clearly known; and parol evidence alone is never sufficient. *Williams v. Henderson, 577*

## MORTGAGE.

See CHATTEL MORTGAGE; DECEDENTS' ESTATES, 3, 4; RAILROAD, 3; REAL ESTATE, ACTION TO RECOVER, 7.

1. *Extension of Time.—Lien.*—Neither an extension of the time of payment nor a change in the form of the indebtedness secured by a mortgage impairs the mortgage lien. *Shuey v. Latta, 136*
2. *Trust and Trustee.—Investment of Funds.—Care Required.*—A trustee to

- invest funds must seek safe investments, and, as a general rule, a second mortgage is not a safe investment. *Ib.*
3. *Same.—Liens.—Priority.—Notice.—Assignor and Assignee.*—If a trustee invest trust funds in a mortgage upon lands upon which he personally holds a mortgage of older date, he violates his duty; and equity will give priority to the mortgage taken as trustee, against an assignee of the first mortgage with actual or constructive notice. *Ib.*
  4. *Same.*—A trustee mortgagee, whose mortgage is a senior lien on land, can not be deprived of such lien merely because he may have a right to make the debt out of a bond executed by his predecessor in the trust by virtue of which the mortgage came to him. *Ib.*
  5. *Same.*—A purchaser of an interest in lands, burdened with an equity in favor of a trust of which he has actual or constructive notice, holds subject to the trust. *Ib.*
  6. *Foreclosure.—Plea of Former Recovery.—Judgment Outside of Issues.*—Where suit is brought upon a note and mortgage before their maturity, and it is alleged in the complaint that by reason of the mortgagor's non-payment of certain assessments, dues, interest and fines, the note and mortgage had become due, and the only issue in the cause is formed by a general denial, and there is a finding and judgment upon the issue for the defendant, such judgment is conclusive only upon the question that the mortgagor was not in default at the commencement of such suit in the payment of any assessments, dues, interest or fines, and not as to the payment or satisfaction of the mortgage. *Anderson, etc., Association v. Hopper, 250*
  7. *Same.—Satisfaction of Mortgage.—Judgment as Evidence.*—The judgment so rendered upon such issue will not constitute sufficient evidence, in a subsequent suit by the owner of the mortgaged premises, to entitle him to a judgment for the satisfaction of the mortgage, or to quiet his title against such mortgage. *Ib.*
  8. *Foreclosure.—Parties.—Trust and Trustee.—Endorser and Endorsee.*—Where a note secured by mortgage is purchased by a bank, and endorsed to its cashier, he is trustee of an express trust, and may sue to foreclose in his own name, under the code. *Holmes v. Boyd, 332*
  9. *Same.—National Banks.—May Purchase Mortgage on Real Estate to Protect Junior Lien.*—A national bank, lawfully holding a mortgage on real estate, may, to protect its interests, purchase a prior mortgage on the same real estate. *Ib.*
  10. *Same.—Contract.—Promissory Note.—Forbearance to Sue.—Payment of Interest.—Consideration.*—An agreement not to sue upon a promissory note which is due, in consideration of the payment at the end of each year of interest not exceeding the rate provided for by the note, such agreement to pay being made not by the maker of the note but by one who has purchased real estate mortgaged to secure it, is without consideration, and will not bar a suit to foreclose, nor is it admissible in evidence in such suit. *Ib.*

#### MUNICIPAL CORPORATIONS.

See CITY; SCHOOL REVENUE, 2; TOWNS.

#### MURDER.

See CRIMINAL LAW, 2 to 10, 23.

#### NATIONAL BANK.

See MORTGAGE, 9.

#### NEGLIGENCE.

See ASSAULT AND BATTERY, 2; ATTORNEY AND CLIENT; JUDGMENT, 4.

1. *Railroads.—Injuries from Fire.—Complaint.*—A complaint against a railroad company for the destruction of property caused by a fire kindled by its negligence on its right of way, which spread to other lands where the property was located, which fails to aver that the company negligently suffered the fire to so spread, is bad on demurrer.  
*Indiana, etc., R. W. Co. v. Adamson, 60*
2. *Physician.—Complaint for Malpractice.*—A complaint against a physician for negligence in treating a patient should allege specifically the things concerning which negligence is imputed, and, if it fail in this, it is error to overrule a motion to make more specific. *Hawley v. Williams, 160*
3. *Complaint.—Liability of Trader.*—A complaint, alleging that the defendant was a dealer in grain, having a warehouse for the storage thereof, with a drive-way thereto and therein by which his customers might reach a place for discharging grain into such warehouse, which way was a passage so dark that defects could not be seen, and which was negligently kept by the defendant in a dangerous condition; that the plaintiff was ignorant thereof, and, having sold to the defendant a load of grain, attempted to obey the defendant's direction to pass the same with his team along the way, and was, without his fault and wholly by reason of the dangerous condition of the way, crushed and injured, is good on demurrer.  
*Nave v. Flack, 205*
4. *Same.—Business Place.—Approaches.*—A trader is bound to maintain in a reasonably safe condition the approaches to his premises which are intended for the use of his customers, and a breach of this duty, resulting in injury to a customer who is himself free from fault proximately contributing thereto, gives a right of action. *Ib.*
5. *Same.*—If the way was really dangerous, the fact that many others had used it without injury was immaterial. *Ib.*
6. *Same.—Definition of "Accident."*—The word "accident," in a restricted sense, means an injury to which human fault does not contribute, but it is also used to designate occurrences arising from carelessness. *Ib.*
7. *Same.*—In such case, mere contribution by the plaintiff to the injury will not bar the right of action, and in the case stated it was not negligence on the part of the plaintiff to drive upon the way unless he had knowledge of the danger of doing so. *Ib.*
8. *Same.—Contributory Negligence.*—Contributory negligence bars the plaintiff's right of recovery only where it is a proximate, and not a remote, cause of the injury. *Ib.*
9. *Same.—Knowledge of Defect in Drive-Way.*—Mere knowledge by the plaintiff that a way is dangerous will not prevent a recovery for injury resulting from an attempt to use it, unless the danger be so great that a person of ordinary prudence would not voluntarily encounter it. *Ib.*
10. *Same.*—A complaint for damages on account of negligence, averring it in general terms without stating the specific facts constituting it, is good on demurrer.  
*Jones v. White, 255*
11. *Injury to Employee by Co-Employee.—Complaint.—Evidence.—Variance.*—A complaint by a servant against his master for injury caused by defective machinery is not supported by evidence that the injury was caused by negligence of the defendant's superintendent.  
*Drinkout v. Eagle Machine Works, 423*
12. *Pleading.—Complaint.—Contributory Negligence.*—An averment in a complaint for damages for injuries negligently caused, that the plaintiff was without any fault, sufficiently negatives contributory negligence on his part, unless it clearly appears otherwise from the specific facts stated.  
*Gheens v. Golden, 427*

13. *Complaint.—Master and Servant.—Contributory Negligence.—Town.—Defective Street.*—In an action against a town for a personal injury received while attempting to cross a gully in a street, over which the plaintiff was driven by his servant in a wagon loaded with hay, an allegation in the complaint, that the plaintiff was without fault, is equivalent to an allegation that neither the plaintiff nor his servant was in fault; and allegations, that, though seeing the gully, the plaintiff believed it reasonably safe to make the attempt, and used due and ordinary care, and that there was no other safe road, do not show contributory negligence on the part of plaintiff.  
*Town of Albion v. Hetrick, 545*
14. *Same.—Question of Fact for Jury.*—In such case, whether the plaintiff, in attempting to cross the gully, was guilty of negligence, is a question of fact for the jury. *Ib.*
15. *Same.—Interrogatories to Jury.*—In such action, it is not error to refuse to submit to the jury interrogatories asking for conclusions of mingled law and fact, as whether or not it was prudent for the plaintiff to attempt to drive over the street in its then condition. *Ib.*
16. *Same.—Witness.—Opinion.*—Upon the trial of such action, the opinions of witnesses who are acquainted with the street are not admissible to prove that the place was so dangerous that a prudent man would not attempt to cross it. *Ib.*
17. *Same.—Instruction.*—It is not error in such action to refuse to instruct the jury that if another was driving the team which was hauling the wagon in which the plaintiff was voluntarily riding, and the negligence of the driver contributed to the injury, the plaintiff could not recover. *Ib.*

#### NEW TRIAL.

- See ASSIGNMENT OF ERROR, 2; CRIMINAL LAW, 2; SUPREME COURT, 9.
1. *Newly-Discovered Evidence.—Surprise.*—Newly-discovered evidence, or surprise, which concerns a matter merely incidental, and which would exert but the slightest, if any, effect upon the cause, is not sufficient ground for a new trial.  
*Mooney v. Kinsey, 33*
  2. *Motion, when Made.—Verdict.—Practice.*—Where a verdict is rendered on the last day of the term, a motion for a new trial made on the first day of the succeeding term is in time. R. S. 1881, section 561.  
*Wallace v. Ramsdell, 173*
  3. *Partition.—Finding.—Evidence.*—Where the court in a partition suit awards the plaintiff too much of the common property, a motion for a new trial on the ground that the finding is not supported by the evidence will present the question.  
*Shaffer v. Shaffer, 472*

#### NON-RESIDENT.

See TRUST AND TRUSTEE, 1.

#### NOTICE.

See BOND, 2; CITY, 5; HIGHWAY, 6; INSANITY; JUDGMENT, 1; MORTGAGE, 3, 5; PARTNERSHIP, 3 to 5; PROMISSORY NOTE, 1, 2.

#### NUNC PRO TUNC ENTRY.

See MISTAKE, 5.

#### OCCUPANCY.

See BOUNDARIES, 2, 3; LANDLORD AND TENANT; REAL ESTATE, ACTION TO RECOVER, 5.

#### OFFICE AND OFFICER.

See BILL OF EXCEPTIONS, 1, 2; CITY, 3 to 5; CONTEMPTS; COUNTY COMMISSIONERS; DRAINAGE, 2; HIGHWAY, 3; INJUNCTION, 6; JUDGE;

JUSTICE OF THE PEACE; PARTITION, 2 to 4; REAL ESTATE, ACTION TO RECOVER, 4; SCHOOL REVENUE; TOWNSHIP TRUSTEE.

1. *Judicial Office.—Constitutional Law.—Eligibility to Office.*—One holding a judicial office by election may, under the constitution of the State, R. S. 1881, section 176, be elected to an office, not judicial, the term of which will begin after his judicial term expires. *Smith v. Moore, 294*
2. *Same.*—One elected, with his consent, to a judicial office, but who does not accept the office, may, under the constitution, sec. 176, *supra*, be afterwards elected to an office, not judicial, the term of which will run during the judicial term to which he was elected. *Ib.*
3. *Same.—Definition.—Eligible.*—The word *eligible*, in section 16, art. 7, of the State Constitution, means *legally qualified*. *Ib.*
4. *Same.—Cases Limited.*—Language found in the opinions in *Waldo v. Wallace*, 12 Ind. 569, *Gulick v. New*, 14 Ind. 93, *Howard v. Shoemaker*, 35 Ind. 111, must be limited to cases where the judicial term would run beyond the commencement of the term of the office, not judicial, to which the person is chosen. *Ib.*
5. *Court.*—Courts take notice of the names and official signatures of their officers. *Beller v. State, 448*

#### OPINION.

See CRIMINAL LAW, 22; NEGLIGENCE, 16; WILL, 8; WITNESS, 4.

#### OVERSEER OF POOR.

See COUNTY COMMISSIONERS, 7, 8; TOWNSHIP TRUSTEE, 5.

#### OWNERSHIP.

See REPLEVIN, 4; TAXES, 2.

#### PARENT AND CHILD.

See DIVORCE; HABEAS CORPUS, 3, 5.

#### PARTIES.

See ASSIGNMENT OF ERROR, 1, 3; CHATTEL MORTGAGE, 3; INJUNCTION, 6; MORTGAGE, 8; PRACTICE, 7; REPLEVIN, 1; TRUST AND TRUSTEE, 2; WILL, 2, 3.

*Practice.—Demurrer.—Defect of Parties.*—A demurrer for a defect of parties can be sustained only when such defect is apparent in the complaint; otherwise the question must be presented by answer.

*Strecker v. Conn, 469*

#### PARTITION.

See MARRIED WOMAN, 6; NEW TRIAL, 3; REAL ESTATE, ACTION TO RECOVER, 4; SUBROGATION.

1. *Commissioner to Sell.—Distribution of Proceeds.—Bond.—Complaint.—Demand.*—A commissioner appointed, in a suit for partition, to sell lands, is required by statute, R. S. 1881, section 1204, to pay the money realized to the persons entitled, on the order of court, and without demand, and a complaint upon his bond for failure need not aver demand. *Ferguson v. State, ex rel., 38*
2. *Same.—Defects of Complaint Cured after Verdict.*—A complaint on the bond of a commissioner appointed to sell lands in partition, alleging for breach a failure to pay the money realized to the parties entitled, which avers that the money is due and unpaid, is not bad after verdict for failure to allege that the court had made an order for its payment. *Ib.*
3. *Same.—Interest.—Principal and Surety.*—A commissioner selling lands in partition is, by virtue of the statute, R. S. 1881, section 5200, liable for interest from the time when he should have paid the money to those entitled, and so are the sureties on his bond. *Ib.*

4. *Same.—Evidence.—Record.—Payments.—Receipts.*—In a suit upon the bond of a commissioner to sell lands in partition, a record of the partition cause, showing that the court had set aside reports of the commissioner after they had been approved, and had disallowed credit for certain receipts which had been presented as vouchers, is, *it seems*, proper evidence, and certainly it is harmless where it is otherwise distinctly proved that the payments covered by the receipts had not in fact been made. *Ib.*
5. *Widow.—Antenuptial Agreement.—Answer.*—In an action by a widow against her deceased husband's children by a former marriage, for a partition of the land of which he died seized, in which she claims one-third in fee and an additional third for life, an answer which merely alleges that such widow and her deceased husband made an antenuptial contract, whereby her interest in his land, in case she survived him, should be limited to one-third for life, is insufficient upon demurrer, unless it also avers that she has no title to the one-third in fee other than such as she claims as widow. *Shaffer v. Shaffer, 472*
6. *Same.—Interest of Widow in Husband's Lands.*—Where an antenuptial contract is thus made, limiting the interest of the wife, in case she survives the husband, to one-third of his land for life, she is not entitled also to one-third in fee. *Ib.*

## PARTNERSHIP.

See BANKRUPTCY; CHATTEL MORTGAGE, 2; INJUNCTION, 4.

1. *Evidence.—Contract of Copartnership.*—In an action against the members of a partnership, the original articles of copartnership are admissible in evidence against one becoming a member of such firm subsequent to its formation. *Strecker v. Conn, 469*
2. *Same.—Liability of One Holding Himself Out as Partner.—Estoppel.*—One who knowingly permits himself to be held out to the world as a partner precludes himself from asserting, as against a party contracting with the firm in the belief that he is a partner, that he is not in fact a member of the copartnership, and it is not necessary for the party seeking to bind such partner to show that he gave credit to the firm on account of such partner's financial ability. *Ib.*
3. *Same.—Notice of Withdrawal of Member.*—A member of a copartnership must, on his withdrawal therefrom, in order to shield himself from liability to one who gives credit to the partnership in the belief that he is still a member, give general notice thereof; former customers of the firm are entitled to actual personal notice. *Ib.*
4. *Same.—Question of Fact.*—The notice which a retiring partner is required to give must be a reasonable one, and whether such an one is so given is a question of fact for the jury. *Ib.*
5. *Same.—General Notoriety.*—Where no notice of the withdrawal of a member from a partnership is publicly given, the retiring member can not escape liability for a firm debt to one who had no actual notice thereof, but who had previous knowledge of the persons composing the firm, from the mere fact that his withdrawal was of general notoriety. *Ib.*

## PAUPERS.

See COUNTY COMMISSIONERS, 7, 8; CRIMINAL LAW, 1; TOWNSHIP TRUSTEE, 5.

## PAYMENT.

See COUNTY COMMISSIONERS, 1 to 4; JUDGMENT, 2, 3; MISTAKE, 1, 3; PARTITION, 4; RECEIPT; REPLEVIN BAIL.

1. *Collateral Security.—Pleading.*—Where a creditor, holding a claim as collateral security, collects it and applies the proceeds to his own use,

it is a payment *pro tanto*, and the fact may be shown under an answer alleging payment. *Farnsley v. Anderson, etc., Works, 120*

2. *Judgment.—Complaint to Satisfy.*—An averment that plaintiff, on, etc., fully paid off said judgment and costs, and the defendant thereupon promised to satisfy the same, in a complaint to enter satisfaction of a judgment in favor of the defendant against the plaintiff, shows payment to the judgment plaintiff. *Holiday v. Thomas, 398*
3. *Same.—Attorney and Client.*—An attorney who takes a judgment can not, without special authority, bind his client by receiving as collateral security, and agreeing to collect, a claim against a third person; but if he does collect it and retains enough to satisfy the judgment, and promises to do so, such retention is payment, and binds the judgment plaintiff. *Id.*

#### PERFORMANCE.

See SALE.

#### PERJURY.

See CRIMINAL LAW, 22.

#### PERSONAL PROPERTY.

See CHATTEL MORTGAGE; COMMON CARRIER; DECEDENTS' ESTATES, 5 to 7; REPLEVIN; SALE.

#### PHYSICIAN.

See COUNTY COMMISSIONERS, 7, 8; NEGLIGENCE, 2; TOWNSHIP TRUSTEE, 5; WILL, 8.

#### PLEADING.

See AGREED CASE, 1; APPEARANCE; ASSAULT AND BATTERY; ATTORNEY AND CLIENT; BOND, 1; CHAMPERTY, 2; CHATTEL MORTGAGE, 5; COMMON CARRIER; CORPORATIONS; COUNTY COMMISSIONERS, 6; CRIMINAL LAW, 11, 15, 22, 24, 25, 26; DECEDENTS' ESTATES, 9, 13; ESTOPPEL; EXECUTION, 1; FRAUDULENT CONVEYANCE, 1; GRAVEL ROAD; HABEAS CORPUS, 1, 2; HIGHWAY, 7; INJUNCTION, 1, 2, 4; JUSTICE OF THE PEACE, 4, 5; MARRIED WOMAN, 2; MISTAKE, 3; MORTGAGE, 6; NEGLIGENCE, 1 to 3, 10 to 13; PARTIES; PARTITION, 1, 2, 5; PAYMENT, 1, 2; PRACTICE, 1; PROMISSORY NOTE, 2; RAILROAD, 1, 3 to 6; REAL ESTATE, ACTION TO RECOVER, 1, 2; REPLEVIN, 3; STATUTES, 2; SUBROGATION; SUPREME COURT, 6, 13; TAXES, 1; TOWNS, 3; WILL, 2, 3.

1. *Defects Cured After Verdict.*—A complaint which states a good cause of action generally, though defectively, is good after verdict.

*Jones v. White, 255*

2. *Answer.—Demurrer.—Harmless Error.*—Where a demurrer is sustained to a paragraph of answer, and it appears that all the material facts alleged therein could have been given in evidence under another paragraph of answer, which remains in the record, the error in sustaining such demurrer, if it be an error, is harmless, and will not authorize the reversal of the judgment. *Darrell v. Hilligoss, etc., G. R. Co., 264*

3. *Exhibits.—Deed.*—A deed referred to in a pleading, but which, though it may be evidence upon the trial, is not the foundation of the action or defence, need not be made an exhibit. *Sedgwick v. Tucker, 271*

4. *Action to Quiet Title.—Counter-Claim.—Demurrer.—Harmless Error.*—Where, in an action to quiet title to real estate, the defendant files a counter-claim, to which a demurrer is sustained, and the court, upon the trial, merely renders judgment against the plaintiff upon his complaint, the ruling upon the demurrer to the counter-claim, if erroneous, is harmless. *McCoy v. Monte, 441*

5. *Written Agreement.—Breach.—Demurrer.*—A complaint, counting upon a written agreement, but not alleging any breach of the agreement by the defendant, and showing that the agreement was incapable of execution by any of the parties, is bad on demurrer for the want of sufficient facts. *Thornion v. Burr, 488*
6. *Practice.—Harmless Error.*—That a paragraph of complaint contains more than one cause of action, justifies a motion to require them to be stated separately; but to overrule the motion is not available error. *Wabash, etc., R. W. Co. v. Rooker, 581*
7. *Supplemental Complaint.—Practice.*—The office of a supplemental complaint is not to supply omissions or defects in the original complaint, but to bring upon the record matters arising after the commencement of the suit. *Diltman v. Diltman, 585*
8. *Statute.—Exception to.*—If an enacting clause of a statute contains an exception, it must be negated by the pleader who seeks to bring his case within the statute; if clearly negated by the facts pleaded, it is sufficient without express words. *Maxwell v. Evans, 596*

POSSESSION.

See BOUNDARIES, 2, 3; CHAMPERTY; CHATTEL MORTGAGE, 4, 6; REAL ESTATE, ACTION TO RECOVER, 5; TAXES, 2.

PRACTICE.

- See AGREED CASE; APPEARANCE; ASSAULT AND BATTERY, 3; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; BOND, 1; COUNTY COMMISSIONERS, 9; CRIMINAL LAW, 3, 4, 6, 21, 25; DECEDENTS' ESTATES, 14; DEMURRER TO EVIDENCE; EXECUTION, 2; EVIDENCE, 3; HABEAS CORPUS, 1, 2, 4, 6; INJUNCTION, 1, 5; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUDGE; JUDGMENT, 1, 10; JURY; MISTAKE, 5; NEW TRIAL; PARTIES; PLEADING, 2, 4, 6 to 8; RAILROAD, 5; REPLEVIN, 3, 4; SPECIAL FINDING; SUMMONS; SUPREME COURT; WILL, 4, 5, 7.
1. *Additional Paragraph.—Discretion of Court.—Prejudice or Injury.—Supreme Court.*—It is within the discretion of the trial court to allow the plaintiff, after the cause was at issue and set for trial, to file an additional paragraph of complaint; and where the record fails to show that the defendant was prejudiced or injured by such action of the court, the Supreme Court can not say that it was injurious or erroneous. *Darrell v. Hilligoss, etc., G. R. Co., 264*
  2. *Production of Articles Used as Evidence.—Affidavit.*—A motion, based on matters not within judicial knowledge, for the production of certain named articles in open court for inspection, should be supported by affidavit showing the facts and some reason for invoking the action of the court. *McDonel v. State, 320*
  3. *Witness.—Misconduct of Counsel.*—Persistence of counsel in putting proper questions to a witness, which the court erroneously refused to allow, is not subject to criticism in the Supreme Court. *Id.*
  4. *Issue and Trial.—Withdrawal of Appearance and Answer.—Motion to Set Aside Default.—Error.*—There is no error in overruling a motion to set aside a default, when the record shows there was no default, but that after issue joined and trial had, and before the announcement of the finding, the defendant's counsel merely withdrew their appearance and the answer to the complaint. *Louisville, etc., R. W. Co. v. Rountree, 329*
  5. *Harmless Error.—Evidence.*—The admission of improper evidence which only tends to prove a fact otherwise clearly shown by competent evidence, which is not controverted, is a harmless error. *Holliday v. Thomas, 398*

6. *Harmless Error*.—Striking out a paragraph of answer averring facts admissible in evidence under the general denial pleaded, is not available error. *Gheens v. Golden*, 427
7. *Non-Joinder of Co-Obligor*.—*Waiver*.—Where one jointly liable with another goes to trial without answering the non-joinder of a co-obligor, he can not, after verdict, raise that question. *Strecker v. Conn*, 469
8. *Harmless Error*.—There is no available error in sustaining a demurrer to a good paragraph of complaint, if the same facts might be proved under another paragraph upon which there is issue and a trial. *Madgett v. Fleenor*, 517

#### PREScription.

See BOUNDARIES, 2, 3; REAL ESTATE, ACTION TO RECOVER, 5.

#### PRESUMPTION.

See AGREED CASE, 3; BILL OF EXCEPTIONS, 6; CORPORATIONS; CRIMINAL LAW, 13; HIGHWAY, 4, 5; INSTRUCTIONS TO JURY, 8; PRINCIPAL AND SURETY, 1; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 8, 10.

#### PRINCIPAL AND AGENT.

See BOND, 2, 3; JUDGMENT, 9.

#### PRINCIPAL AND SURETY.

See BOND, 2, 3; DECEDENTS' ESTATES, 2; JUDGMENT, 11; PARTITION, 3; PROMISSORY NOTE, 1, 2, 6; REPLEVIN, 1, 2; REPLEVIN BAIL.

1. *Co-Sureties*.—*Contribution*.—*Presumption*.—*Evidence*.—In an action on a promissory note against the makers, it having been established that the last two of the four signers of the note were sureties thereon, it was

*Held*, that the presumption arose that said sureties were co-sureties, and were bound to contribution, but that such presumption might be overthrown by parol evidence, and the last signer might thus be shown to be, in fact, a surety for all the other makers. *Baldwin v. Fleming*, 177

2. *Same*.—*Right of Surety to Fix His Liability*.—*Agreement*.—Where a promissory note has been signed by a surety and entrusted by him to a principal maker, who thereafter obtains the signature of another surety thereon, the latter surety has a right to determine for whom he will become surety, and to fix the nature of his liability as between himself and the prior makers; and by agreement, written or parol, express or implied, between him and said principal, the liability of said subsequent signer may be made that of surety for all the makers who have signed before him, without any agreement or communication between him and such prior surety or the payee, and without the knowledge of such prior surety, of whose suretyship said subsequent signer has notice when he signs. *Ib.*
3. *Same*.—*Affixing the Word "Surety"*.—The addition of the word "surety" to his name by one who signs a promissory note after the signatures of other makers, without his specifying for whom of such prior signers he intends to become surety, will not alone rebut his implied promise to contribute as a co-surety with prior sureties on such note. *Ib.*

4. *Land of Surety Sold on Execution and Purchased by Principal*.—A principal debtor who buys the lands of his surety upon execution issued against them jointly, merely pays his own debt, and in equity takes no title to the lands. *Madgett v. Fleenor*, 517

#### PRIVATE WAY.

See RAILROAD, 2.

#### PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION.

PROMISE.

See CONTRACT, 2; FRAUDULENT CONVEYANCE, 3; PAYMENT, 3; PRINCIPAL AND SURETY, 3; PROMISSORY NOTE, 3; TOWNSHIP TRUSTEE, 2.

PROMISSORY NOTE.

See CHATTEL MORTGAGE, 6; JUDGMENT, 4, 11; MORTGAGE, 6 to 10; PRINCIPAL AND SURETY.

1. *Principal and Surety.—Agreement.—Delivery.*—Where a promissory note, perfect on its face, containing no indications that it is delivered in violation of an agreement, is taken in good faith, and for a valuable consideration, the taker will not be affected by any agreement made between the principal and the surety, of which he has no notice.  
*Whitcomb v. Miller, 384*
2. *Same.—Pleading.—Answer.—Notice.*—An answer by a surety on a promissory note, that the principal had delivered it in violation of an agreement, made between them, that the latter would procure an additional surety, but not alleging notice of such agreement by the payee, is insufficient on demurrer.  
*Ib.*
3. *Estoppel.—Assignor and Assignee.—Defence.*—If the maker of a promissory note knows that another person is about to purchase it, and he informs such person, upon enquiry, that he has no defence and will pay the note, and such person purchases the same upon the faith of such promise, such maker is estopped to assert any defence against such purchaser, though he was ignorant of his defence at the time his promise was made.  
*Plummer v. Farmers Bank, 386*
4. *Execution.*—The execution of a promissory note includes both a signing and delivery, and implies a complete contract.  
*Nicholson v. Combs, 515*
5. *Same.—Material Alteration.*—The material alteration of a promissory note made at the instance of the payee, and without knowledge of the maker, releases the latter from liability.  
*Ib.*
6. *Same.*—After a promissory note is signed and delivered, the procurement by the payee of an additional signature, without the knowledge of the maker, releases the latter.  
*Ib.*

QUESTION OF FACT.

See CHATTEL MORTGAGE, 4; CRIMINAL LAW, 25; INSTRUCTIONS TO JURY, 7; NEGLIGENCE, 14; PARTNERSHIP, 4; TOWNSHIP TRUSTEE, 5.

QUIETING TITLE.

See CHAMPERTY, 2; PLEADING, 4; TAXES.

*Pleading.—Defences.—Evidence.*—In an action to quiet title to real estate, any matter of defence, either legal or equitable, may be given in evidence under the general denial.  
*Hogg v. Link, 346*

RAILROAD.

See COUNTY COMMISSIONERS, 5; NEGLIGENCE, 1.

1. *Killing Stock.—Complaint.*—A complaint against a railroad company for killing an animal, which, with the other necessary averments, alleges that the railroad "was not securely fenced," is good, and if the railroad could not properly be fenced at the place, the fact is matter of defence, concerning which the complaint need not make any averment.  
*Terre Haute, etc., R. R. Co. v. Penn, 284*
2. *Railroad Tracks.—Secure Fences.—Animals Killed or Injured.—Private Way.*—Under section 4025, R. S. 1881, a railroad corporation is liable for stock killed or injured by its locomotives, cars or other carriages run on its road, unless it be shown that the road was securely fenced in, and the fence properly maintained, by the company or other person running the same, at the point where the stock entered upon the road;

and the fact that the stock entered upon the road through an open gate at a private crossing will not exempt the corporation or other person from such liability. *Baltimore, etc., R. R. Co. v. Kreiger, 380*

3. *Appropriation of Lands.—Trespass.—Answer.—Mortgage.—Foreclosure and Sale.—License.*—To a complaint for trespass upon real estate, an answer is good which alleges that on the 6th of June, 1872, a certain railroad, duly incorporated, appropriated the land in controversy, and paid the amount assessed to the heirs who owned the land, one of which was the plaintiff, which payment was accepted and money retained; that on the 2d day of October, 1871, the said railroad executed a mortgage, to secure its certain bonds, on its entire main line and branches, "made or to be made, \* \* and all lands \* \* acquired or appropriated, or which may hereafter be acquired or appropriated by said company, for the purposes of rights of way or for any other purpose"; that said mortgage was foreclosed and the property sold to A., to whom a deed was executed; that the defendant, another railroad organized under the laws of Indiana, by its contractor, also a defendant, by leave, license and direction of such owner under said sale, entered upon the said land for the purpose of constructing a railroad.

*Logan v. Vernon, etc., R. R. Co., 552*

4. *Abandonment and Forfeiture.—Pleading.—Collateral Attack.*—A pleading which seeks to set up an abandonment and forfeiture of the road for failure to perform the acts mentioned in section 3980, R. S. 1881, but which does not allege that the forfeiture had been judicially declared in a suit for that purpose at the instance of the State, by information on the relation of the prosecuting attorney, as contemplated by sections 1131, 1132, is bad. A cause of forfeiture, not judicially declared in a direct proceeding, can not be taken advantage of collaterally. *Ib.*
5. *Killing Stock.—Pleading.—Demurrer.—Practice.—Evidence.—Jurisdiction.*—A paragraph of complaint against a railroad company for killing stock, contained two causes of action, of one of which the court had no jurisdiction.

*Held*, that a demurrer, for want of facts, did not reach the defect.

*Held*, also, that evidence in support of the cause of action of which the court had no jurisdiction should have been excluded on objection.

*Wabash, etc., R. W. Co. v. Rooker, 581*

6. *Same.*—A complaint under the statute, R. S. 1881, section 4025, against a railroad company for killing stock, which avers that the act was done by "the defendant, or some lessee thereof, or other person unknown to the plaintiff," is bad on demurrer. *Ib.*

#### RATIFICATION.

See JUDGMENT, 9.

#### REAL ESTATE.

See BOUNDARIES; CONTRACT, 2; DECEDENTS' ESTATES, 3, 4, 8, 10 to 14; EVIDENCE, 4; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; JUDGMENT, 3, 7, 8; LANDLORD AND TENANT; MARRIED WOMAN; MORTGAGE; PARTITION; PRINCIPAL AND SURETY, 4; RAILROAD, 3; REAL ESTATE, ACTION TO RECOVER; REPLEVIN BAIL; SUBROGATION; TAXES; TRUST AND TRUSTEE; WILL, 1.

#### REAL ESTATE, ACTION TO RECOVER.

See CHAMPERTY, 2; MARRIED WOMAN, 2.

1. *Ejectment.—Complaint.—Jurisdiction.—Presumption.*—Where a complaint in ejectment does not disclose the county in which the land is situated, and a court of general jurisdiction, without objection, proceeds to judgment, it will be presumed after judgment that the land is in the county where the suit was begun. *Brown v. Anderson, 93*

2. *Same.—Description of Lands.*—A description of lands in a complaint for possession is sufficient if, by the aid of a competent surveyor and persons knowing the location of monuments mentioned as points in the boundaries, the lands can be found. *Ib.*
3. *Same.—Evidence.—Declarations.—Fence.—Boundaries.*—Whether a certain fence was the correct boundary between the lands of the plaintiff and defendant, viz., the line between the southeast and southwest quarters of section 19, was in question. The same line of fence continued south beyond the lands of these parties, the plaintiff's ancestor, from whom he had inherited, once owning lands of which the fence extended south was apparently the western boundary, viz., the northeast quarter of section 30. Evidence of the declarations of the ancestor that this fence in section 30 was too far west was held to be immaterial, and, therefore, properly rejected. *Ib.*
4. *Same.—Survey.—Change of Boundaries by Partition Commissioners.*—A survey fixing a corner, made by a private surveyor, and not at the instance of any of the parties to a suit or their privies, and without notice to them, is not evidence against either of them; nor can commissioners making partition, by a survey, change the boundaries of the lands parted, to the profit of the adjacent owners. *Ib.*
5. *Same.—Title by Occupancy.—Adverse Possession.—Statute of Limitations.—Prescription.*—Continuous occupancy and use of land as owner for twenty years to a fence really not upon the true boundary line, takes away the title of the real owner, and transfers it to such occupant, so that he may maintain ejectment. *Ib.*
6. *Title by Sheriff's Sale.—Evidence.*—In an action to recover real estate by a purchaser thereof at a sheriff's sale, against the execution defendant, the plaintiff must show, to support his title, a judgment, execution, sale and deed. *Leary v. New, 508*
7. *Same.—Mortgagor.—Estoppel.*—A mortgagor in possession can not, after a decree of foreclosure against him, set up a title in a third person or himself to defeat the title of the purchaser of the land under the decree. *Ib.*

REASONABLE DOUBT.

See CRIMINAL LAW, 8.

RECEIPT.

See PARTITION, 4.

*Evidence.—Payment.*—A receipt is but *prima facie* evidence of payment, and may be contradicted by oral evidence. *Ferguson v. State, ex rel., 33*

RECORD.

See BILL OF EXCEPTIONS; MISTAKE, 5; PARTITION, 4; SUPREME COURT, 7 to 10, 12, 13; WILL, 4.

REDEMPTION.

See TAXES.

RENTS.

See LANDLORD AND TENANT; TAXES, 2.

RENTS AND PROFITS.

See TAXES, 2.

REPEAL OF LAWS.

See HUSBAND AND WIFE, 2; STATUTES.

REPLEVIN.

See CHATTEL MORTGAGE, 5, 6; DECEDENTS' ESTATES, 5.

1. *Replevin Bond.—Parties.—Joinder of Plaintiffs.—Judgment.*—Holders of separate judgments, whose executions have been levied on personal property which has been taken from the sheriff by replevin, may unite as plaintiffs in a suit for breach of the replevin bond, and the assignee of one of the judgments, the assignment of which is technically defective, is a real party in interest as plaintiff. *Thomas v. Irwin, 557*
2. *Same.—Breach.—Damages.—Judgment.*—Where in replevin there is a trial and verdict for the defendant and that the property be returned, but no judgment of return, the sureties in the bond are not liable for failure to return the property. *Ib.*
3. *Description of Property.—Uncertainty.—Sufficiency of Complaint.—Motion in Arrest.*—In an action of replevin, mere uncertainty in the description of the property affords no ground for sustaining a motion in arrest of judgment, as such motion only questions the sufficiency of the complaint after verdict. *James v. Fowler, 563*
4. *Same.—Instructions of Court.—Evidence.—Ownership.—Directing Verdict.*—Where, in an action of replevin, the evidence shows, without conflict, the plaintiffs' ownership of the property in controversy, and the only conflict in the evidence is in relation to irrelevant and immaterial matters, the trial court may, without invading or usurping the province of the jury, direct their verdict in favor of the plaintiffs. *Ib.*
5. *Same.—Estray Law.—Trespassing Animals.—Defence.*—Where the owners of domestic animals bring an action to recover their possession, it is not a sufficient defence for the defendant to show that he had taken up the animals while trespassing on his premises, but he must also show that he had substantially complied with the provisions of the estray laws after the animals were taken up. *Ib.*

#### REPLEVIN BAIL.

1. *Judgment.—Payment.—Subrogation.—Assignee.—Judgment in Force.*—The sale of the real estate of a replevin bail to satisfy the judgment is a compulsory payment thereof, within the meaning of section 1214, R. S. 1881, and the judgment will remain in force for the use of such bail; but it is otherwise when real estate, owned by the bail when he replevied the judgment, but since conveyed, is sold to satisfy the judgment. In such case, the property so taken, as between it and property of a principal in the judgment subject to the lien thereof, would be secondarily liable, and the person who owned it when so taken would be subrogated to the rights of the judgment plaintiff against the property primarily liable. *Wilson v. Murray, 477*
2. *Same.—Fraudulent Conveyance.—Former Adjudication.*—Where real estate, subject to the lien of a judgment, is sold as the property of a replevin bail who has theretofore conveyed it, and such bail assigns the judgment, his assignee can not, as against the purchaser of the real estate of the principal in the judgment, be regarded as having the rights, under section 1214, of a replevin bail who has paid the judgment. Nor does an adjudication, in an action by creditors against such replevin bail, that the conveyance is fraudulent and void as to them, affect the rights of the bail or his assignee. *Ib.*
3. *Same.—Injunction.*—An injunction will lie by the purchaser of the real estate of a principal in a judgment to prevent the sale of such real estate on execution issued by the assignee of the replevin bail, where property, once owned by such bail and subject to the lien of the judgment, has been sold to satisfy the judgment after he had conveyed the same, although the conveyance has been adjudged to be fraudulent as to the bail's creditors. *Ib.*

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*Delivery.*—*Goods in Bulk.*—*Title.*—*Contract.*—*Performance.*—A sale of personal property constituting a part of a large mass of like property passes no title to the purchaser until it is separated from the mass, or in some other manner designated. *Commercial Nat. Bank v. Gillette*, 263

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*State, ex rel., v. Board, etc.*, 359

2. *Dog Tax Fund.*—*Township.*—*City.*—*Trustee.*—Where a township embraces within its limits a city, the whole of the surplus fund in excess of \$50 arising from the registration of dogs, must, under the act of April 13th, 1881, Acts 1881, p. 395, section 2651, R. S. 1881, be transferred to the school revenue of the township, and no part of it belongs to the school revenue of the city, and the trustee of the township is not authorized to apportion it between the township and the city.

*School City of South Bend v. Jaquith*, 495

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R. S. 1881; nor is an agreement as to the facts, which is used merely as evidence upon the trial, an agreed case under section 553, upon which an exception to conclusions of law will present any question to the Supreme Court. *Zeller v. Crawfordville, 263*

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1. *Repeal by Implication.*—Repeal by implication occurs only where there is an irreconcilable repugnancy between two statutes, in which case the earlier in point of time is repealed by the later so far only as is necessary to bring the two into harmony. *Carver v. Smith, 228*
2. *Statutory Construction.*—*Repeal by Implication.*—*Criminal Law.*—Where a new law covers the whole subject-matter of the former statute, and is intended to supersede it and take its place, the new law repeals by implication the former statute, and, therefore, section 27 of the felony act of June 10th, 1852, was repealed by implication by section 2204, R. S. 1881. *Wagoner v. State, 504*
3. *Pleading.*—*Exception.*—If an enacting clause of a statute contains an exception, it must be negatived by the pleader who seeks to bring his cause within the statute; if clearly negatived by facts pleaded, it is sufficient without express words. *Marwell v. Evans, 596*

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See BOUNDARIES, 3; REAL ESTATE, ACTION TO RECOVER, 5; SCHOOL REVENUE, 1; WILL, 2.

*Demand.*—Where one receives money of another to be paid upon the debt of the latter, and fails to so pay, the statute of limitations does not begin to run against the latter until demand is made. *Emerick v. Chesrown, 47*

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#### SUBROGATION.

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*Judgment.*—*Partition.*—*Sheriff's Sale.*—*Costs.*—*Res Adjudicata.*—A decree was obtained making real estate conveyed by an ancestor subject to the payment of certain judgments against him; on the same day a partition of the same lands was had between the widow and heirs of the judgment debtor, and it was agreed by all the parties that the proceeds of such sale (not including one-third reserved for the widow) be applied first, \$281 to the widow, to make up balance of her \$500 under

- the statute, and next to the payment of the judgments. A commissioner made sale, but the court refused to enforce the agreement by applying the purchase-money on the judgments. Thereupon the lands were sold by the sheriff to satisfy the judgments, and the purchaser at the partition sale was compelled to purchase for his protection.
- Held*, that the purchaser had a right to be reimbursed for the amount paid upon his purchase from the sheriff out of the proceeds of the partition sale.
- Held*, also, that, in a suit by the purchaser against the widow and infant heirs to obtain such subrogation, they having made defence, it was not error to render judgment for costs against them.
- Held*, also, that an answer in such case, averring a former decision against the plaintiff, on a motion for the same relief in the partition case, and disclosing that there is no record of the decision, is bad on demurrer.
- Dunning v. Seward*, 63

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- Sargent v. Flaid*, 501
2. *Same.—Specific Objections.*—The specific objection to a summons upon a motion to set it aside must be shown.
- Id.

## SUPERINTENDENT OF ROADS.

See HIGHWAY, 3.

## SUPERVISOR.

See INJUNCTION, 6.

## SUPPLEMENTAL COMPLAINT.

See INJUNCTION, 1, 2; PLEADING, 7.

## SUPREME COURT.

- See AGREED CASE; ASSAULT AND BATTERY, 8; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; COSTS, 1; COUNTY COMMISSIONERS, 9; CRIMINAL LAW, 1, 3; EVIDENCE, 3; HABEAS CORPUS, 1, 6; INSTRUCTIONS TO JURY; JUDGE; JUDGMENT, 1; PRACTICE, 1, 3, 4 to 6, 8; SPECIAL FINDING.
1. *Exception.—Witness.*—A question was put to a witness, and answered without any objection thereto so far as appeared by the bill of exceptions, save that after the answer it was stated that "the plaintiff excepted to the ruling."
- Held*, that this presented no question for the Supreme Court.
- Mooney v. Kinsey*, 33
2. *Evidence.—Leading Questions.*—The Supreme Court will not reverse a case because leading questions were permitted, unless it appears that there was an abuse of discretion that did substantial injustice.
- App v. State*, 73
3. *Bill of Exceptions.—Evidence.*—Where the evidence is necessary to the determination of a cause, and the bill of exceptions purports to, but does not, include it, no question is presented to the Supreme Court.
- Hendrix v. Rieman*, 119
4. *Practice.—Harmless Error.*—A refusal to strike out part of a pleading is not available error.
- McFall v. Howe, etc., Co.*, 143
5. *Weight of Evidence.*—Before the Supreme Court can disturb the finding

of the trial court upon a question of fact, it must be convinced that the conclusion reached was wholly unsupported by the evidence.

*Baldwin v. Fleming, 177*

6. *Sufficiency of Complaint.—Defective Allegations of Fact.—Failure to Object Below.—Defects Cured by Verdict.*—Where the sufficiency of the complaint, or of any of its averments, is not called in question in the trial court, either by demurrer or by motion, and the complaint, though defective in some of its averments, states facts sufficient to render the judgment thereon a bar to another suit for the same cause of action, such defects are cured by the verdict, and can not be made available for the reversal of the judgment by an assignment of error, in the Supreme Court, that the complaint does not state facts sufficient to constitute a cause of action. *Baltimore, etc., R. R. Co. v. Kreiger, 380*
7. *Practice.—Instructions.—Statute Construed.*—The proviso to section 650, R. S. 1881, makes no change in the former practice as to making up a record in order to secure the judgment of the Supreme Court upon instructions given. *Drinkout v. Eagle Machine Works, 423*
8. *Same.—Presumption.*—That an instruction assumes the truth of a fact which is admitted, or not disputed, is no objection to it, and the Supreme Court, when the evidence is not in the record, will presume that facts so assumed were admitted or conclusively proven. *Id.*
9. *Record.—New Trial.*—Neither affidavits nor instructions become part of the record on appeal by incorporating them in the motion for a new trial. *Gheens v. Golden, 427*
10. *Error.—Transcript.—Deposition.—Presumption.*—If error be not affirmatively shown by the record, there will be no reversal by the Supreme Court; and when the record fails to show for what cause a deposition, in whole or in part, was suppressed, the Supreme Court will presume in favor of the correctness of the trial court. *Vanvalkenberg v. Vanvalkenberg, 433*
11. *Weight of Evidence.*—The Supreme Court will not disturb a verdict on the mere weight of evidence. *Webb v. Zeller, 445*  
*Harring v. Nowlin, 601*
12. *Evidence.—Record.*—Where a question depends upon the evidence, the record must, as a general rule, contain all the evidence, in order to present the question; but where a question does not depend upon the entire evidence, and it affirmatively appears that all the evidence upon which it does depend is in the record, the question is properly presented. *Shaffer v. Shaffer, 472*
13. *Practice.—Reversal of Judgment.*—Where a cause is tried upon issues joined on a complaint of two or more paragraphs, and it appears that a demurrer to one of the paragraphs has been erroneously overruled, the Supreme Court will reverse the judgment for such erroneous ruling, unless the record affirmatively shows that the verdict and judgment rest exclusively upon the good paragraphs of the complaint. *Eitel v. Batchelder, 520*
14. *Appeal.—Dismissal.—Final Judgment.*—A judgment of the circuit court, that "the cause of action is dismissed at the costs of the plaintiff," is final, and an appeal may be taken therefrom. *Koons v. Williamson, 599*
15. *Brief.*—A paper writing filed as a brief but suggesting no reason for the reversal of the cause, making no argument and citing no authority, is not a brief within the requirements of the Supreme Court. *McCann v. Rodifer, 608*

SURFACE WATER.

See WATERCOURSE.

SURETY OF THE PEACE.

*Jurisdiction.*—The circuit court has no original jurisdiction of proceedings for surety of the peace. *State v. Cooper, 575*

SURVEY.

See BOUNDARIES, 1; REAL ESTATE, ACTION TO RECOVER, 4.

SURVEYOR.

See REAL ESTATE, ACTION TO RECOVER, 4.

TAXES.

See COUNTY COMMISSIONERS, 5.

1. *Tax Sales of Real Estate.—Action to Quiet Title.—Married Woman.—Sufficiency of Complaint.—Demurrer.*—In an action by a married woman to quiet the title to her real estate against the purchaser thereof, for State and county or city taxes, if she fail to show that her real estate was not legally subject to taxation for State and county or city purposes, or that the delinquent and current taxes and costs, for which her real estate was sold, were not properly and legally assessed and charged against her and her property, or that the several sales of her real estate for taxes, by the treasurers of the county and city respectively, were, in some manner or for some cause, irregular, illegal and void, or that she had redeemed, or offered to redeem, her real estate from the tax sales thereof, in the manner prescribed by law, her complaint must be held bad on a demurrer thereto, for the want of sufficient facts. *Elhel v. Butchelder, 520*
2. *Same.—Redemption.—Rights of Married Woman.—Certificate of Sale.—Possession of Premises.—Rents and Profits.*—Under section 210 of the tax law of December 21st, 1872, a married woman might redeem her lands from sales thereof for taxes within two years after the expiration of her disability, but the statute gave her no additional rights in relation to such redemption; and under section 203 of the same law (1 R. S. 1876, p. 120), the auditor's certificate of the tax sale entitled the holder to the possession of the premises therein described, and this title to possession carried with it the ownership of the rents and profits of the lands, without liability to account therefor. *Ib.*

TENANTS IN COMMON.

See CHAMPERTY, 1.

TITLE.

See BOUNDARIES, 2, 3; CHAMPERTY, 2; JUDGMENT, 3; PARTITION, 5; REAL ESTATE, ACTION TO RECOVER, 5 to 7; REPLEVIN, 4; SALE; TAXES; TRUST AND TRUSTEE, 2, 3.

TOWNS.

See NEGLIGENCE, 13.

1. *Justice of the Peace.—Jurisdiction.*—The jurisdiction of a justice of the peace of suits to recover penalties for the violation of town ordinances extends to the sum of \$200, as in other civil actions. *Clevenger v. Rushville, 258*
2. *Same.—Liquor Selling.—License.—Statute Construed.*—It is not an offence against the laws of the State to sell intoxicating liquor without a town license, and hence section 1640, R. S. 1881, does not prohibit the recovery of a penalty for violation of a town ordinance on that subject. *Ib.*
3. *Same.—Ordinances.—Pleading.—Exhibits.*—A complaint to recover a penalty for violation of a town ordinance must exhibit or copy so much of the ordinance as relates to the subject, *e. g.*, where one section provided a penalty for selling liquor without a town license, while another made provisions for obtaining such license and the amount to be paid, both sections should be shown. *Ib.*

4. *Incorporation.—Evidence.—Judicial Knowledge.*—Courts take judicial knowledge of the incorporation of towns, and proof thereof is not necessary. *Town of Albion v. Hetrick, 545*

## TOWNSHIP TRUSTEE.

See COUNTY COMMISSIONERS, 7, 9; DRAINAGE, 2; HIGHWAY, 3; SCHOOL REVENUE, 2.

1. *Constitutional Law.—Special Laws.—Mandamus.*—Special laws for the relief of local officers, without whose fault public funds for which they are responsible have been lost, are constitutional and valid; and where the officer, a township trustee, has supplied the lost funds, a special act directing that the amount be refunded to him out of the funds of the township may be enforced by mandamus. *Mount v. State, ex rel., 29*
2. *School Township.—Orders or Certificates.—Consideration.—Acts or Promises of School Trustee.—Estoppel.*—Where the trustee of a school township has issued an order or certificate of indebtedness, in the name of his township, without any consideration therefor, such order or certificate is invalid and void, and can not be enforced against the township; nor, in such case, will the acts, conduct or promises of the trustee, or of his successors in office, estop the township from pleading the want of consideration, as a sufficient defence to any suit against it upon such order or certificate. *Axt v. Jackson School Township, 101*
3. *Schools.—School-Houses.—Mandate.—County Superintendent.*—A school trustee has no lawful authority to provide furniture for a room for school purposes, or employ teachers for service therein, unless such room is owned or leased by the school township, and even if the county superintendent, on appeal, direct him to do so, he may properly disobey the order, and mandate will not lie to compel him to obey it. *State, ex rel., v. Sherman, 123*
4. *Same.—Abolishing School Districts.*—After a school trustee has, on appeal, been ordered by the county superintendent to provide furniture for the school-house of a district, he may at once abolish the district and provide proper school facilities for the people thereof in other districts, and then disregard the order of the superintendent. *Id.*
5. *Board of County Commissioners.—Poor.—Employment of Physician.—Statute Construed.—Question of Fact.—Contract.*—A poor person, being sick, required such attention as the physician employed by the commissioners could not give by reason of his remote residence. *Held*, that in such case the township trustee might, under section 5764, R. S. 1881, employ a physician. *Held*, also, that it was a question of fact whether the township was "provided for." *Held*, also, that the necessity of the employment was to be decided by the trustee, and, in the absence of fraud or collusion, his determination was conclusive. *Board, etc., v. Seaton, 158*

## TRANSCRIPT.

See BILL OF EXCEPTIONS; CRIMINAL LAW, 16; EXECUTION, 2; SUPREME COURT, 10.

## TREASURER OF STATE.

See COUNTY COMMISSIONERS, 1 to 4.

## TRESPASS.

See CRIMINAL LAW, 17; INJUNCTION, 6; RAILROAD, 3; REPLEVIN, 5.

## TRIAL.

See PRACTICE, 4.

TRUST AND TRUSTEE.

See BANKRUPTCY; FRAUDULENT CONVEYANCE, 2; MARRIED WOMAN, 3 to 6; MORTGAGE, 2 to 5, 8.

1. *Non-Resident.—Statute Construed.*—Section 2988, R. S. 1881, has no retrospective operation, and only forbids the appointment of non-resident trustees by deed, mortgage or writing. It does not affect trusts created by operation of law. *Rinker v. Bissell, 375*
2. *Same.—Parties.—Express Trust.—Sheriff's Sale.*—A trustee to whom, before the statute, R. S. 1881, section 2988, took effect, real estate had been conveyed in trust to secure the payment of bonds, is trustee of an express trust, may, under section 252, sue in his own name to foreclose, without joining the bondholders, and may, at sheriff's sale, under the decree, purchase the lands, and upon thus acquiring title will hold as such trustee by operation of law, with power to sell and convey. *Id.*
3. *Conveyance.*—Where real estate is conveyed to A. and B., husband and wife, in trust for C., his children and their descendants, if he shall have any, and in the absence of such children or their descendants in trust for the heirs of A. and B., with power to sell and convey such land with the consent of C., and reinvest the proceeds in other land to be held for the same purposes, such conveyance does not, under our statute, invest C. with the legal title to such land, and he can not, therefore, convey it to another. *McCoy v. Monte, 441*

USE AND OCCUPATION.

See LANDLORD AND TENANT.

VARIANCE.

See COMMON CARRIER; NEGLIGENCE, 11.

VENDOR AND VENDEE.

See JUDGMENT, 7, 8; MORTGAGE, 5; SUBROGATION.

1. *Constitutional Law.—Contract, Obligation of.—Vested Rights.*—The obligation of an executory contract to convey land gives to the vendee the vested right to a conveyance of such title as the vendor had when the contract was made, and any subsequent legislation which diminishes such title, and thereby puts it out of the vendor's power to perform his contract, impairs its obligation, and is therefore void. *Wiseman v. Beckwith, 185*  
*Wiseman v. Williams, 602*
2. *Same.—Widow.—Dower.—Conveyance.—Stare Decisis.*—A., when the statute gave the wife dower, contracted to convey lands to B., and made conveyance after the statute had given the wife one-third in fee, she not joining in the conveyance. *Held*, that, upon the death of A., his widow was not entitled to a third in fee. *Held*, also, that *Strong v. Clem, 12 Ind. 37*, and subsequent cases, holding that in such case the widow is not entitled even to dower, have established a rule of property which can not now be questioned. *Id.*

VENUE.

See CRIMINAL LAW, 11, 15.

VERDICT.

See INSTRUCTIONS TO JURY, 3, 7; INTERROGATORIES TO JURY; NEW TRIAL, 2; PARTITION, 2; PLEADING, 2; PRACTICE, 7; REPLEVIN, 3, 4; SUPREME COURT, 6; WILL, 5.

VOLUNTARY PAYMENT.

See MISTAKE.

## WAIVER.

See APPEARANCE; CONTRACT, 1; JUDGE; PRACTICE, 7.

## WATERCOURSE.

*Definition of.—Obstruction.—Damages.—Surface Water.*—A lake fed by streams, the waters of which in times of flood find exit by rapid percolation through a bed of gravel, so that there is a sensible current towards the gravel bed, is a running stream, and not merely surface water, and one who obstructs the flow to such place of discharge, and thereby causes the water to overflow the lands of another, is liable for the consequent damages. *Hebron G. R. Co. v. Harvey, 192*

## WEIGHT OF EVIDENCE.

See SUPREME COURT, 5, 11.

## WIDOW.

See DECEDENTS' ESTATES, 8, 9; PARTITION, 5, 6; SUBROGATION; WILL, 1; VENDOR AND VENDEE, 2.

## WILL.

1. *Construction.—Widow.*—A will directed the sale of the testator's real and personal estate, and gave to the testator's widow "all that remains of the estate after paying the debts, \* \* for her support and that of the minor children," and made her guardian of the children during her life. There was no other provision made for children, and no residuary clause. The wife was a helpless invalid, and the estate was, after paying debts, a tract of land worth \$450 when the testator died.

*Held*, that under the will, interpreted in the light of the circumstances, the widow took the land in fee simple. *Roy v. Rowe, 54*

2. *Contest of.—Statute of Limitation.—Complaint.—Amendment.—Parties.*—Where new parties are brought in by amendment of the complaint, and such amendment involves any question as to the statute of limitations, such action, as to such parties, as a general rule, is deemed to be commenced at the time such amendment is made; but this rule does not apply where no judgment can be rendered till all the parties are before the court, and, hence, where an action to contest a will is brought within three years from its probate against some of the persons beneficially interested therein, and others are made parties by amendment of the complaint after three years, such action is deemed commenced against all the parties from the time the complaint was filed, and is not barred as to any of them. *Floyd v. Floyd, 130*

3. *Same.—Legatee.—Estoppel.*—In an action by several persons to contest a will, an answer that one of such persons is a legatee, and that he has received and retains his legacy is insufficient, as the action is not joint, but is a proceeding *in rem*, where the interests of the parties are several, and though one may have estopped himself to maintain the proceeding, this fact does not preclude the others who have united with him in such proceeding. *Ib.*

4. *Same.—Amendment of Record.—Practice.*—An objection to the complaint, upon the ground that it appears to have been filed more than three years after the will is alleged to have been probated, is removed by an amendment of the record showing that the original complaint was filed within three years from such probate. *Ib.*

5. *Verdict.—Contest of Will.*—A verdict finding that the "writing in question, which was read to the jury, is the last will of said M.V.," though informal, is sufficient, no paper but the contested will having been read to the jury. *Vanvalkenberg v. Vanvalkenberg, 433*

6. *Instructions.—Case Followed.*—Instructions to the jury like those in *Bundy v. McKnight, 48 Ind. 502*, numbered 2, 7, 8, are not erroneous. *Ib.*

7. *Same.—Verbal Inaccuracies.*—Inaccuracy of language in an instruction, which would not probably mislead intelligent men, will not be deemed available error. *Ib.*
8. *Same.—Evidence of Mental Capacity of Testator.*—Where physicians have testified as to the mental condition of one who attempted to make a will, which is under contest, it is error to tell the jury that no medical experts have testified, and that the finding, as to testamentary capacity, must be based upon the testimony of neighbors and intimate friends of the deceased, as to facts known to them, and their opinions based thereon. *Ib.*
9. *Same.—Undue Influence.*—Undue influence, destroying free agency, when a will was made, vitiates the will, though the devisee may have had no agency in procuring its exercise and no knowledge of the fact. *Ib.*
10. *Same.—Evidence.—Declarations.—Res Gestæ.*—Declarations of the testator as to the importunities of a devisee for a favorable will, made at a time so remote from the execution of the paper that they are not part of the *res gestæ*, can be considered only upon the question of testamentary capacity. *Ib.*

WITNESS.

- See CRIMINAL LAW, 22; DECEDENTS' ESTATES, 2; EVIDENCE, 6; NEGLIGENCE, 16; PRACTICE, 3; SUPREME COURT, 1; WILL, 8.
1. *Competency.—Decedents' Estates.*—Under the act of 1867, when an administrator is a party to a suit growing out of matters occurring after the death of the intestate, the opposite party was a competent witness for himself. *Sedgwick v. Tucker 271*
  2. *Same.—Husband and Wife.*—Where husband and wife were joined as parties, each was, under the act of 1867, a competent witness for himself or herself, without reference to the effect of the testimony given upon the interests of the other. *Ib.*
  3. *Impeachment of.—Evidence.*—Where a witness testifies in his examination in chief that the reputation of a party is good with respect to some quality or disposition, it is competent to show by cross-examination that he has heard reports at variance with the reputation he has given the party. *McDonel v. State, 380*
  4. *Opinion.—Evidence.—Utility of Highway.*—In a proceeding to establish a highway, on trial in the circuit court, the opinion of witnesses that such highway will or will not be of public utility is not admissible in evidence, even when the facts upon which the opinion is based are stated. *Loeshbaugh v. Birdsell, 466*

WRITTEN INSTRUMENT.

See PLEADING, 3, 5.

END OF VOL. 90.

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